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ALEXANDER L. STEVAS,
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No. _____

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1982

WILBUR HOBBY, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT.

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June 29, 1983

QUESTIONS PRESENTED FOR REVIEW

1. Whether an "indefensible sort of entrapment" is brought about by United States criminal conviction for fraud in a CETA contract between Petitioner and North Carolina where there was open disclosure of all the facts in issue by Petitioner, and full authorization to proceed on these facts by the North Carolina contracting officers.

2. Whether the courts below erred in requiring Petitioner to make out a prima facie case of selective prosecution as a condition precedent to a threshold inquiry into that issue.

3. Whether the courts below erred in condoning the systematic exclusion of Blacks from appointment as foremen of federal grand juries.

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JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on March 9, 1983. A timely petition for rehearing and suggestion for rehearing en banc was denied on April 29, 1983. This petition for certiorari was filed within 60 days of that date. This Court's jurisdiction is invoked under 28 USC sec. 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

18 USC sec. 371 provides in pertinent part as follows: "Conspiracy to commit offense or to defraud United States:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy,

each shall be fined not more than \$10,000, or imprisoned not more than five years, or both."

18 USC Sec. 665 provides in pertinent part as follows: "Theft or embezzlement from employment and training funds:

(a) Whoever, being an officer, director, agent or employee of, or connected in any capacity with any agency receiving financial assistance under the Comprehensive Employment and Training Act knowingly hires an ineligible individual or individuals, embezzles, willfully misapplies, steals, or obtains by fraud any of the moneys, funds, assets, or property which are the subject of a grant or contract of assistance pursuant to such Act shall be fined not more than \$10,000 or imprisoned for not more than 2 years, or both; . . ."

The Fifth Amendment to the Constitution of the United States provides in part that:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of indictment of a Grand Jury nor be deprived of life, liberty, or property, without due process of law. . . ."

STATEMENT OF THE CASE

The bed-rock facts here are that Wilbur Hobby, long-time President of the North Carolina AFL-CIO, owned a printing company named Precisions Graphics, Inc. Precision Graphics signed a contract under the Comprehensive Employment and Training Act of 1973 (CETA) with the North Carolina Department of Natural Resources and Community Development (NRCD) to train 40 unemployed and unskilled young men and women

as computer operators. The contract authorized payment of \$130,833 to Precision Graphics. The contract was fully performed. The students were trained, and almost all obtained employment in their new fields. Precision Graphics billed the state only \$88,786 for its services. It did the agreed upon job for about two-thirds of the agreed upon price. Some \$42,047 remained available to educate and train other deprived youths in useful skills. Nevertheless, Wilbur Hobby was indicted and convicted on four counts of conspiracy and fraud in connection with this contract.

The somewhat unique circumstances require a brief exposition of what went on. To begin with, Wilbur Hobby was a welcome participant in the various state sponsored programs to train the unemployed for useful employment. Prior to the events here in issue, he had signed some 15 CETA contracts

(mostly on behalf of the AFL-CIO) with the state of North Carolina, its departments and agencies. (App. p. 1389) Mort Levi, the alleged co-conspirator here, was employed full time to prepare CETA proposals, and operate the programs on a day to day basis.

Wilbur Hobby and the AFL-CIO were also consumers of computer services, and knew of the shortages of skilled operators. (App. p. 1202) The consequence is that Wilbur Hobby and officials of the North Carolina NRCD began discussions very early in 1979 concerning a CETA program to train computer operators.

A 1978 amendment to the CETA Act was designed to involve the private sector, and it made funds available for that purpose (App. p. 574). For this reason the state officials suggested to Wilbur Hobby that he organize a private corporation to apply for

the proposed training grant, rather than apply in the name of the AFL-CIO. Wilbur Hobby and Mort Levi organized a corporation named Precision Data Institute, Inc., and Precision Data Institute filed a grant request for the training of data processing personnel. (App. p. 590) On March 26, the officials in the North Carolina NRCD recommended that this application be authorized. (App. p. 591)

Meanwhile, Wilbur Hobby had been negotiating with a company named Mohawk Data for the rental or purchase of computer equipment. The salesman informed him that the minimum lease would be for 42 months, and that the rental price for this period would exceed the purchase price by over \$1,000. (App. p. 451) Hobby decided to buy, and on behalf of Precision Data Institute, signed a purchase contract on April 10, 1979.

Precision Data Institute had no assets, and Hobby told representatives of Mohawk Data that the payments would come from the CETA grant. (App. 472) Officials of the North Carolina NRCD testified that it is customary and proper to make advances for the purchase of equipment. (App. 560) In fact, they testified that some 90% of the contractors avail themselves of the advance system; most lack "up front" money and need an advance to get started. (App. 601)

Wilbur Hobby met with state officials immediately prior to his departure for Washington, D.C. to sign the purchase agreement with Mohawk Data. They knew he was going to purchase a computer, and they knew he would charge the purchase to his grant. (App. p. 679) They testified that this was permissible under the regulations. (App. p. 672)

A review process continued within the North Carolina NRCD, and the officials there decided it would be better to take the contract from Precision Data Institute and award it to Precision Graphics (the printing company owned by Wilbur Hobby). (App. p. 1502) Precision Graphics had a track record of successful CETA grants, and capital assets; Precision Data Institute had neither. Accordingly, Mort Levi sat down with state officials and prepared a new contract in the name of Precision Graphics. (App. pp. 660-663)

The contract between Precision Graphics and the North Carolina NRCD provided that the computer recently purchased by Precision Data Institute would be leased (along with the maintenance agreement) to Precision Graphics for the duration of the training period. (App. pp. 1506-1508) The amounts of the rentals were line items in

the budget submitted by Graphics, and approved by the state officials. (App. pp. 1506-1508)

This background takes us to the five counts of the indictment.

Count one is a general allegation that Wilbur Hobby and Mort Levi conspired to defraud the United States of funds and monies under the CETA contract between Precision Graphics and the North Carolina NRCD by purchasing computer equipment and computer maintenance services from Precision Data Institute, Inc., such purchases resulting in unlawful profits to Precision Data Institute, Inc. (App. p. 137)

The second count charges that Mort Levi (but not Wilbur Hobby) knowingly recruited individuals for the computer training program who were not eligible under the contract. The contract provided that the students would be recruited only from five

designated counties, and the government alleged in part that Mort Levi recruited students from other counties as well. For example Sonia Bailey, the first government witness on this score, was questioned closely on whether her home was in Person County, where her parents lived and where she went on weekends; or in Durham, where she resided in a boarding house during the week while attending school. The contract did not list Person County as one of the five counties from which Precision Graphics would recruit the students.^{1/} Mort Levi was also charged with recruiting students who were ineligible under the law. No one is eligible for CETA programs if their income exceeds \$3,023 for any twelve-month

^{1/} Residents of Durham County, but not residents within the city of Durham, were eligible for the program. Sonia Bailey apparently lived within the city of Durham, which made all this examination unnecessary.

period. Bonnie Monsees, the government lead-off witness on this score, testified that Levi told her she was ineligible when she applied for the program because her tax form showed she had earned \$5,000 in the previous twelve months. He told her she would become eligible if she went without any pay for the first 8 weeks of the program. These are samples of the "illegalities" charged in the indictment against Mort Levi.

The third count alleges that Wilbur Hobby (as President of Precision Data Institute) had a maintenance contract whereby Mohawk Data agreed to do the required maintenance at a rate of \$214.00 per month. Wilbur Hobby then charged Precision Graphics (his printing company) the amount of \$125.00 per week for this same service. This continued from May 21 through October 10, 1979, and allegedly resulted in an

illegal profit to Hobby (and Precision Data Institute) of approximately \$1,840.00 (App. p. 142)

The defense to the third count was twofold. First, as a matter of law the complete disclosure nullified the allegation of "fraud". Second, as a matter of fact the Government was not complete in its description of the contract. In addition to the fixed amount, the maintenance contract between Mohawk and Precision Data Institute provided that repairs after 5:00 p.m. would cost an additional \$60.00 per hour, with a 2 hour minimum; i.e., there would be a charge of \$120.00 for each evening service call. (App. p. 497) Representatives of Mohawk further testified that it takes time "to get those bugs worked out" after the initial installation. (App. p. 445) In short, if the service men had to make more than two service calls a month

during the evening hours (classes went until 9:00 p.m.), Precision Data Institute would have been in the red on this service contract.

The fourth count charges Wilbur Hobby with fraud in the amount of rental charged Precision Graphics for the computer equipment and for the maintenance. A Government witness testified that CETA regulations applicable to transactions between organizations under common control limit the amount of rental to the amount that could be claimed as a depreciation on a tax return. The government witness further testified that the allowable depreciation in this case would have been \$5,535. Anything above that amount, he testified, would be illegal. (App. p. 1446) Since Precision Data Institute charged Precision Graphics some \$16,625 for computer rental and maintenance, there was an alleged over-charge

of \$11,090. (App. p. 1506)

Again the defense was simple: there could be no "fraud" because Wilbur Hobby and the officials of the North Carolina NRCD acted in good faith when they agreed to a rental in the amount of \$16,250.

(App. p. 1545) It was also brought out on cross examination that some of the relevant CETA regulations were not published until July 20, 1979, "which could have been well into the time period of this contract".

(App. p. 1521)

The fifth count charges Wilbur Hobby with fraud in charging Precision Graphics some \$3,000 in rent for the use of the data processing equipment for the period of May 21, 1979 through June 15, 1979; a period when the equipment was not yet functionally in operation. (App. p. 143)

Again there is a simple defense. These first weeks of the program were utilized for an orientation program; students

testified that the instruction prior to the arrival of the computers was "very beneficial". (App. p. 748) Moreover, the total amount of the rent was set out in the contract, and pro-rated over the number of weeks. Rent was charged whether or not the machines were used at any particular moment on any particular week. Finally, the disputed rental payment had both prior authorization and subsequent ratification from the appropriate officials of the North Carolina NRCD, thereby negating any suggestion of "fraud".

The jury found Wilbur Hobby and Mort Levi guilty on all counts as charged. They were sentenced to 18 months in prison, to five years probation, and to a fine of \$10,000 on each count. (App. pp. 1796-1800)

REASONS FOR GRANTING THE WRIT

I.

The Decision Below Sanctioned "An
Indefensible Sort of Entrapment"
Contrary To The Holdings Of
This Court in Cox v. Louisiana
and Raley v. Ohio.

As indicated in the statement of the case, Wilbur Hobby and the appropriate state officials worked in close concert at every step of the CETA contract. There was full disclosure on the part of Wilbur Hobby, the state officials gave full approval after thorough intra- and inter-office disagreement and discussion. The very vouchers charged as fraudulent were prepared for Wilbur Hobby by Mr. Vincent Harris from the Fiscal Technical Assistance Unit of the North Carolina NRCD. (App. p. 1560) Wilbur Hobby submitted them without change. (App. pp. 1561-1563)

This Court has held that when public officials authorize the acts in question,

to sustain a later conviction for doing those acts "would be to sanction an indefensible sort of entrapment by the State." Put simply, "The Due Process Clause does not permit convictions to be obtained under such circumstances". Raley v. Ohio, 360 U.S. 423, 425-426, 438 (1959); Cox v. Louisiana, 379 U.S. 559, 571 (1965).

Here, the trial judge denied Wilbur Hobby's request that the jury be instructed that:

"If a person discloses to a governmental agency the material facts necessary for an understanding of a particular transaction, or group of transactions prior to obtaining any funds from the governmental agency, and then submits requests for payment in connection with that transaction or transactions, and the governmental agency approves said requests for payment, then, as a matter of law, there can be found no fraud or misrepresentation in connection with the transaction or transactions". (App. p. 312)

Here, the Court of Appeals affirmed the District Court without discussion.

Raley and Cox differ from this case only in that they involved state convictions for actions which state officials earlier had authorized. This case involves a federal conviction for actions which state officials had earlier authorized; but the state officials were expending federal funds pursuant to a federal statute and under federal regulations.

It is submitted that the situation here presents a substantial question of due process which requires this Court's attention.

II.

The Decision Below Requiring a Prima Facie Showing To Trigger An Evidentiary Hearing On the Issue of Selective Prosecution Conflicts With the Holdings in Other Circuits, and Effectively Overrules the "Evil Eye and Unequal Hand" Doctrine of Yick Wo v. Hopkins.

A second major issue in this case arises out of the fact that Wilbur Hobby

was the first person ever to be prosecuted by the United States for CETA fraud in the Eastern District of North Carolina; despite ample official evidence that the audits of 379 other CETA contracts disclosed what are known as "questioned costs". The norm, the universal practice when costs are questioned, is to proceed by way of administrative review and civil suit; not as here by way of criminal indictment.

The procedure is set forth in the regulations and in the individual CETA contracts. If costs are questioned, the matter is referred to a division in the North Carolina NRCO known as the "Questioned Cost Resolution Unit". Following internal review in that unit, there is a conference with the contractor to review the problem. (App. p. 1567) If there is disagreement at that level, the issue can be appealed to the Atlanta regional office of the United

States Department of Labor. The decision of the United States Department of Labor is reviewable by the North Carolina state auditor; and ultimately the state can bring civil suit for breach of contract to recover the alleged "unallowable costs". (App. pp. 1568-1569)

None of that procedure was followed here. In fact, the federal government specifically requested the state of North Carolina to terminate this contractual method for resolving cost disputes; and began a criminal grand jury investigation. (App. p. 233)

Prior to trial, Wilbur Hobby moved for a hearing on the issue of selective prosecution. He did not move to dismiss the indictment for this reason, as he did not yet feel confident of all the facts.

In support of his motion for a hearing, Wilbur Hobby established a number of

threshold facts.

He established that his was the first criminal indictment ever by the United States in the Eastern District of North Carolina for CETA fraud. (App. p. 231)

He established that there were 379 other contemporaneous CETA contracts where audits disclosed questioned costs. (App. p. 232)

He established that in 55 of these other contracts, the questioned costs exceeded \$50,000. (App. p. 232)

He itemized a number of well publicized contemporaneous situations where there was no federal prosecution. (App. pp. 233-234)^{2/}

^{2/} The following are illustrative of well publicized situations which, perforce, came to the attention of the federal authorities.

"Now, there's a story on the 15th of March...of \$148,000 that went for work that shouldn't have been done, allegedly, on the St. Augustine College campus".

"Between the 14th of September and the 21st of September in 1979, there were eight

Finally, he established that for a decade he had been the President of the North Carolina AFL-CIO, and for more years than that had been an outspoken and unabashed critic of established state leadership, as well as the established policies in regard to labor-management relations, in regard to racial segregation, in regard to questions of peace and war, in regard to consumer protection, in regard to women's rights, and a host of other controversial issues. (App. p. 233).

(footnote cont'd)

stories about CETA jobs that allegedly and improperly went to a State senator." (App. p. 233)

"Between the 13th of August of 1979 and the 3rd of July of 1980 there were fifteen stories about a \$527,000 overcharge, alleged in regard to a program in Washington County". (App. p. 234)

"On the 13th of October of 1979, there was an allegation that a state NRCP employee approved the contract for \$77,000 to a group in which her husband was a partner and from which he would specifically benefit". (App. p. 234)

Counsel for Wilbur Hobby submitted that they had established more than a "frivolous" or "colorable basis" to support the motion for an evidentiary hearing. (App. p. 235). The trial court denied the motion because Wilbur Hobby had not established a "prima facie case". (App. p. 241)

The Court of Appeals approved of this holding without discussion.

This requirement that Wilbur Hobby make out a prima facie case of invidious selective prosecution as a condition precedent to a threshold hearing where he can question government officials on this score has the practical consequence of overruling the doctrine of Yick Wo v. Hopkins, 118 U.S. 356 (1886).

Almost a century ago this Court established that the law may not be applied and administered by "public authority with an

evil eye and an unequal hand." Yick Wo v. Hopkins, 118 U.S. 356 (1886). Of course "the conscious exercise of some selectivity in enforcement (of criminal laws) is not in itself a federal constitutional violation"; but it becomes so when the selection is "deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification". Oyer v. Boles, 368 U.S. 448, 456 (1962).

That much is clear. What remains uncertain is the standard to be applied when determining whether or not to grant an evidentiary hearing to explore this issue. The various Courts of Appeal are in conflict on this matter.

The Court of Appeals for the First Circuit has ruled that

"A defendant need not, however, present a prima facie case in order to justify an evidentiary hearing. So long as the defendant alleges some facts (a) tending to show that he has been selectively prosecuted, and (b)

raising a reasonable doubt about the propriety of the prosecution's purpose a district court, in the absence of countervailing reasons, should grant a request for a hearing". United States v. Saade, 652 F.2d 1126, 1135 (1st Cir. 1981).

The Court of Appeals for the Second Circuit has ruled that a "colorable basis" entitles the defense to subpoena documentary evidence required to establish a selective prosecution defense. The Court explained: "we would first require some evidence tending to show the existence of the essential elements of the defense and that the documents in the government's possession would indeed be probative of these elements." United States v. Berrios, 501 F.2d 1207, 1211-1212 (2d Cir. 1974) (emphasis supplied).

The Court of Appeals for the Third Circuit is in accord: "central to the issue must be some initial showing that there is a colorable basis for the

contention". United States v. Berrigan, 482 F.2d 171, 177 (3rd Cir. 1973) (emphasis supplied) Accord, United States v. Torquato, 602 F.2d 564 (3rd Cir. 1979): To meet the required "threshold showing of discriminatory prosecution before an evidentiary hearing will be accorded", the defendant bears the burden of proving "a colorable entitlement to the claim of selective prosecution. Some credible evidence must be adduced indicating that the government intentionally and purposefully discriminated against the defendant by failing to prosecute other similarly situated persons". 602 F.2d at 569-570.

The Court of Appeals for the Fourth Circuit in this case approved a standard demanding a prima facie as a threshold requirement for an evidentiary hearing on selective prosecution.

The Court of Appeals for the Fifth

Circuit meets the defense of selective prosecution with "extreme skepticism"; on the theory that "the courts are not free to interfere with the free exercise of the discretionary powers of the attorneys of the United States over criminal prosecutions". United States v. Kelly, 556 F.2d 257, 264 (5th Cir. 1977). Accordingly, it will not permit questioning of the prosecutors without some prior demonstration by the defendant "that his complaint might have merit". 556 F.2d at 265.

The Court of Appeals for the Sixth Circuit states that "Government attorneys have great latitude in deciding which potentially criminal actions to prosecute"; consequently the "offer of proof" of selective prosecution must "show that the decision to prosecute him was made in bad faith and was based upon

impermissible considerations". United States v. Cooper, 577 F.2d 1079, 1086 (6th Cir. 1978).

The Court of Appeals for the Seventh Circuit, en banc, with one concurrence and four dissents, wrote as follows regarding the question of proof necessary to trigger a hearing:

"The presumption is always that a prosecution for violation of a criminal law is undertaken in good faith and in nondiscriminatory fashion for the purpose of fulfilling a duty to bring violators to justice. However, when a defendant alleges intentional purposeful discrimination and presents facts sufficient to raise a reasonable doubt about the prosecutor's purpose, we think a different question is raised". United States v. Falk, 479 F.2d 616, 620-621 (7th Cir. 1973). (emphasis supplied)

The Court of Appeals for the Eighth Circuit is ambiguous on this ~~issue~~. In United States v. Warinner, 607 F.2d 210 (8th Cir. 1979) a panel held that the defendant must establish a prima facie

case "to warrant a hearing". 607 F.2d at 213.^{3/} In United States v. Larson, 612 F.2d 1301 (8th Cir. 1980), a different panel held that "A hearing is necessary only when the motion alleges sufficient facts to take the question past the frivolous stage and raises a reasonable doubt as to the prosecutor's purpose". 612 F.2d at 1304-1305.

The Court of Appeals for the Ninth Circuit holds that the defendant ultimately "must bear the burden of proving a prima facie case". United States v. Scott, 521 F.2d 1188, 1195 (9th Cir. 1975). But as a preliminary matter, "hearings on similar pretrial objections are usually in order when enough facts are alleged to take the question past the

^{3/} The trial court in the instant case relied upon Warinner. (App. p. 240)

frivolous stage", and that is enough in a motion for an evidentiary hearing in a selective prosecution situation. United States v. Oaks, 508 F.2d 1403, 1404 (9th Cir. 1974). Accord, United States v. Erne, 576 F.2d 212, 216 (9th Cir. 1978) (A defendant is entitled to an evidentiary hearing "when enough facts are alleged to take the question past the frivolous stage".)

The Court of Appeals for the Tenth Circuit apparently has not decided the quantum of proof necessary to trigger a preliminary hearing.

The Court of Appeals for the District of Columbia Circuit holds that "where all that is being sought is discovery", it "makes sense to require a colorable claim" before "subjecting the Government to discovery". Attorney General of U.S. v. Irish People, Inc., 684

P.2d 928, 947 (D.C. Cir. 1982).

The short of the matter is that "In recent years there has been an explosion in the number of cases in which claims of invidiously selective prosecution have been made"; United States v. Kelly, 556 P.2d 257, 264 (5th Cir. 1977) and the Courts of Appeals are in conflict, if not in confusion, on how these issues are to be treated in the first instance. It is therefore appropriate for this Court to grant certiorari in this case, and provide leadership guidance.

III.

The Decision Below Condoning The Systematic Exclusion of Blacks From Judicial Appointment as Forepersons of Grand Juries Denies Due Process of Law, and Conflicts with Decisions In Other Circuits and With The Decision Of This Court In Rose v. Mitchell.

The third major issue in this case arises out of the fact that there were fifteen grand juries in the Eastern

District of North Carolina from the years 1974 through 1981, and the federal judges appointed only white males to serve as foreman on each one of them.

Wilbur Hobby moved to dismiss the indictment for this reason. He introduced testimony from James M. O'Reilly, a "statistical social science consultant" (App. p. 170) that during these years there were no Blacks or women appointed as forepersons (App. p. 177), and only three Blacks and six women were appointed as deputy forepersons. App. pp. 189-90).^{4/}

The trial judge denied the motion to dismiss (App. p. 213) and the Court of Appeals affirmed. (Appendix to Brief, pp. 13-19)

This conflicts with the applicable decisions of the Court of Appeals for the

^{4/} Co-defendant ~~Mort~~ Levi is Black.

Fifth and Eleventh Circuits, and with the rationale of this Court in Rose v. Mitchell, 443 U.S. 549 (1979).

The Court of Appeals for the Fifth Circuit first assumed that "the right to a grand jury selected without regard to race applies fully when only the selection of the foreperson is at issue rather than the selection of the entire grand jury venire". Williams v. State of Miss., 608 F.2d 1021 (5th Cir. 1979).

The Court of Appeals for the Fifth Circuit then expressly held, en banc, that the Equal Protection Clause is violated "by the systematic exclusion of black persons from service as grand jury foremen". Guice v. Fortenberry, 661 F.2d 496, 498 (5th Cir. 1981).

The Fifth Circuit cases involved the exclusion of Blacks from the leadership position of grand jury foremen of

state grand juries. The Court of Appeals for the Eleventh Circuit followed these cases when the issue involved the exclusion of Blacks from appointment as foremen in the federal grand jury system. The Eleventh Circuit expressly rejected the government contention that "the office of federal grand jury foremen is of no constitutional or statutory significance, and therefore, appellant cannot seek relief through the protection of the Fifth Amendment". United States v. Perez-Hernandez, 672 F.2d 1380, 1384 (11th Cir. 1982).

The Court below discussed these cases, and respectfully disagreed. The Court distinguished the significance of the role played by the foremen of the state grand juries with that played by the foreman of the federal grand jury, and said that the duties of the federal foremen are "ministerial" only. He "has

no special powers or duties beyond those borne by every grand juror, that meaningfully affect the rights of persons charged with crime". Accordingly, the Court below concluded that

"The impact of the federal grand jury foreman as distinguished from that of any other grand juror, upon the criminal justice system and the rights of persons charged with crime is minimal and incidental at best. Any suspicion that his office may enlarge his capacity to influence other grand jurors is too vague and uncertain to warrant dismissal of indictments and reversals of convictions". (Appendix to Opinion, pp. 17-18)

In effect, the Court below ruled that the continued refusal to appoint Blacks as foremen of federal grand juries was not prejudicial to the defendant in this case, and therefore constitutionally irrelevant. But this is directly in conflict with the principal thrust of this Court's opinion in Rose v. Mitchell, 443 U.S. 545 (1979).

This Court framed the initial argument there as "whether claims of grand jury discrimination should be considered harmless error when raised, on direct review or in a habeas corpus proceeding, by a defendant who has been found guilty beyond a reasonable doubt by a properly constituted petit jury at trial⁵ On the merits that was free from other constitutional error". This Court then held that racial discrimination in the selection of grand jury foremen⁵/ was not and could not be harmless error.

This Court wrote that "discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice. Selection of

⁵/ This Court assumed "that discrimination with regard to the selection of only the foreman requires that a subsequent conviction be set aside, just as if the discrimination proved had tainted the selection of the entire grand jury venire". 443 U.S. at 551-552, n. 4.

members of a grand jury because they are of one race and not another destroys the appearance of justice and thereby casts doubt on the integrity of the judicial process". 443 U.S. at 556. It "impairs the confidence of the public in the administration of justice"; and the harm "is not only to the accused" but "it is to society as a whole".

The Court reminded that "Because discrimination on the basis of race in the selection of members of a grand jury thus strikes at the fundamental values of our judicial system and our society as a whole", "for nearly a century" it had reversed convictions "where discrimination in violation of the Fourteenth Amendment is proved", and always "without regard to prejudice". 443 U.S. at 556.

The Court acknowledged that "there

are costs associated with this approach"; but believed that "such costs as do exist are outweighed by the strong policy the Court consistently has recognized of combating racial discrimination in the administration of justice". 443 U.S. at 558.

The Court concluded on this point that: "We adhere to our position that discrimination in the selection of the grand jury remains a valid ground for setting aside a criminal conviction". 443 U.S. at 559.

Rose v. Mitchell may be strong medicine, but so are the Equal Protection and Due Process Clauses of the Constitution. Unless this Court is willing to see them denigrated piecemeal, it should grant certiorari and reverse the decision below. There is no question but that the issue is both significant, and

recurrent.^{6/}

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fourth Circuit.

Respectfully submitted,

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Counsel for Petitioner

June 29, 1983

^{6/} The Court below lists some of the District Court cases in which the issue has been recently presented. Appendix to the Opinion, p. 15, n. 6

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of June, 1983, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid to Samuel T. Currin, United States Attorney, Eastern District of North Carolina, United States Post Office Building, Raleigh, North Carolina 27608.

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Counsel for Petitioner

UNITED STATES COURT OF APPEALS
For the Fourth Circuit
No. 82-5143

United States of America, Appellee,

versus

Wilbur Hobby, Appellant.

No. 82-5144

United States of America, Appellee,

versus

Mort Levi, Appellant.

Appeal from the United States District
Court for the Eastern District of North
Carolina. W. Earl Britt, District Judge

Argued November 12, 1982

Decided March 9, 1983

Before HALL and Phillips, Circuit Judges,
and HAYNSWORTH, Senior Circuit Judge

Shelley Blum; Thomas C. Manning (Cheshire,
Manning & Parker on brief) for Appellants;
Janis H. Kockritz, U.S. Dept. of Justice
(Samuel T. Currin, United States Attorney
on brief) for Appellee.

HAYNSWORTH, Senior Circuit Judge:

Wilbur Hobby and Mort Levi were convicted of conspiring to defraud the United States of funds appropriated under the Comprehensive Employment and Training Act in violation of 18 U.S.C.A. §§ 371 and 665. In addition, Hobby was convicted of misapplying or obtaining by fraud monies granted under CETA in violation of § 665, while Levi was convicted of hiring ineligible persons for training in a program established with CETA monies in violation of § 665. Each was sentenced to imprisonment and now appeals his conviction.

I.

Wilbur Hobby was president of the AFL-CIO in North Carolina and owner of Precision Graphics, Inc., a printing company located across the street from the union office. He had involved himself

many times with CETA projects,¹ and in one of those projects he had worked with Mort Levi.² The union had need of computer servuces in its daily business, and typically such services were obtained by contracting with outside companies. Hobby conceived the idea that he might provide such services through the acquisition of a minicomputer compatible with the national union's big computer.

In January 1979, Hobby began discussions with a representative from Mohawk-Data Sciences about acquiring a computer for union work. Over the next two to three months, discussions about what equipment was necessary continued. In

1. In all Hobby had signed 15 CETA contracts between early 1977 and late 1979.

2. During one of Hobby's CETA funded printing training programs in 1978-79, Hobby paid Levi \$2,500 for "curriculum committee support."

the meanwhile, however, Hobby and Levi formed a new company, Precision Data, Inc. Levi was shown on the articles of incorporation as an incorporator and also was listed as registered agent. Hobby owned 95% of the corporation's stock and was its president.

In February 1979, the newly formed corporation, Precision Data, submitted to the North Carolina Department of Natural Resources and Community Development a CETA grant request for funds to train data processing personnel. The application was received with skepticism, both because of doubt of the need of another program in that vicinity and because Precision Data had no staff, capital, plant or experience in computer training. The director of the Division of Community Employment of NRCD suggested that the contract be awarded to Precision Graphics

because of its previous experience with CETA contracts. Levi met with two NRCD employees and drafted a new CETA application on behalf of Precision Graphics.

On May 21, 1979, the application of Precision Graphics for a grant of \$129,429 was placed on NRCD's authorization list.

Meanwhile, in April, Hobby, on behalf of Precision Data, had contracted to purchase a computer from Mohawk. The purchase price was \$41,317.68; to be paid with a down payment of \$10,329.42 and twenty-four equal monthly installments of \$1,721.57. In addition, Precision Data agreed to pay Mohawk \$214 a month for maintenance.

On the same day that the application of Precision Graphics was placed on the contract authorization list, in a contract signed by Hobby, Precision Graphics agreed to lease Precision Data's computer

for a monthly rental of \$3,000 and a maintenance fee of \$500 a month.

In late May, a CETA contract with Precision Graphics was signed and an advance of \$43,696, requested by Levi, was paid. Almost immediately thereafter Hobby transferred \$18,000 from the account of Precision Graphics to the account of Precision Data to ~~cover~~ a check he had earlier drawn on the computer. The \$18,000 check was said to be "\$9,000 for transportation and \$9,000 for computer rental." In early July, Hobby wrote another check from Precision Graphics to Precision Data as payment for computer rental, this one for \$5,000. Thus, notwithstanding that the computer was not even in place until June 15, Precision Graphics expended and Precision Data received for the audit period beginning May 21 and ending September 30, 1979,

\$14,000 for computer rental.³ Moreover, Precision Graphics paid Precision Data for computer maintenance at the rate of \$500 a month beginning May 21, though Precision Data's obligation to pay Mohawk for such services did not begin to run until July 16, 1979, and then only at the rate of \$214 a month.

The largest diversion of funds, however, occurred in connection with charges for the transportation of students. Almost \$28,000 was charged to Precision Graphics by Precision Data for services that never were provided.

Levi recruited the students, and had a number of ineligible students falsify statements to make them appear eligible.

3. The contract subsequently was extended for six weeks to mid-November, but the events that occurred after September 30 were not addressed in the audit nor are they relevant to this appeal.

Beginning in late August, a supervisor of an "Independent Monitoring Unit" in NRCD began to monitor Precision Graphics' CETA contract. When she and other employees of NRCD sought to meet with Hobby and Levi, they were rebuffed by Levi, and later Hobby refused them free access to books and records and other materials they needed. Finally, in late September the Secretary of NRCD requested an audit by the state auditing office. It produced a report released in May 1980.

II.

Hobby urges reversal on fourteen separate grounds. Levi makes three points which parallel three of Hobby's. Most of the contentions are of little substance or frivolous, and only two seem to us to deserve discussion.

A.

Three counts of the indictment

charged Hobby with having procured CETA funds by fraud and diverting such funds for (1) purchase of data processing equipment, (2) the rental of such equipment, and (3) the maintenance of such equipment. The charge was in the conjunctive, though the statute, 18 U.S.C.A. § 665, is in the disjunctive. The statute is violated if the CETA funds are obtained by fraud or if they are diverted or misapplied.

Hobby obtained a preliminary instruction, to which the United States did not object, stating both the statutory prongs in the conjunctive so the prosecution would be required to prove both fraud in obtaining the grant and misapplication of the funds. In his final instructions to the jury, however, the district judge properly charged the statutory offense stating the two prongs in the disjunctive. This, Hobby contends, was a deprivation

of his right of due process since his lawyer had been led to believe that he could obtain an acquittal upon a finding of no fraud in obtaining the grant, regardless of any later misapplication.⁴

If we assume that defense counsel was misled by the prosecution and that the government had the burden of proving beyond a reasonable doubt fraud in obtaining the grant and misapplication of the funds, we can perceive no consequential prejudice to Hobby. Evidence of

4. We doubt that defense counsel was misled. It is true that the indictment charged the matter in the conjunctive and, at Hobby's request, the district judge stated the matter in the conjunctive in his preliminary charge to the jury. The lawyer also points to the government's response to a pretrial motion in which at one place the two offenses appear in the conjunctive, but that followed a disjunctive statement clearly tracking the language of the statute. It would be supposed that the lawyer had read the statute and knew its provisions.

fraud in obtaining the grant and the misapplication of granted funds was derived from the records of the two corporations, Precision Graphics and Precision Data, the CETA applications, testimony relating to those documents and records and to events associated with them. The same core of operative facts forms the basis for finding fraud or misapplication, or both. Indeed, the two things were closely interrelated, for what Hobby did with the money tended to show both misapplication and fraud in obtaining the funds. Hobby admits that the allegation of fraud was the focus of his defense, and in making that defense he necessarily was required to do all that he could to explain and justify the expenditures. Counsel did not suggest what more he might have done in defense of the charge of misapplication of the funds. We cannot conceive of

anything that might have been done that was not done.

The principle upon which Hobby relies is not without support. In United States v. San Juan, 545 F.2d 314 (2d Cir. 1976), a woman was convicted of bringing into the United States a large sum of currency without having declared it. She crossed the border from Canada in a bus, and, at trial, the prosecution insisted that the offense was committed while the defendant was on the bus during inquiries by Customs agents and undertook the burden of proving its case on that basis. When the trial judge submitted the case to the jury, however, it instructed that they might convict on the basis of events that occurred after the plaintiff had been removed from the bus and escorted into the Customs House. The Court of Appeals decided there had been a deprivation of due

process since the prosecution had provided defense counsel with abundant reason to believe that he could and should focus his defense on the events and occurrences on the bus. We accept the principle, of course, but San Juan is not this case. Proof of both branches of the offense were found in the corporate books and records, fully explored by the audit. The audit revealed discrepancies that were the basis for finding acquisition of the CETA money by fraud and the misapplication of some of those monies. In this case it cannot be said that defense counsel directed his efforts at a different set of facts from those that became the basis for his client's conviction.

B.

Each of the defendants sought dismissal of the indictment on the basis of alleged discrimination in the selection

of grand jury foremen in the Eastern District of North Carolina. They produced evidence that in the years 1974-1981 no black had served as the foreman of the grand jury in that district, and no woman.

There is no contention of discrimination in the selection of the grand jury. They were selected under an approved plan designed to insure fair representation of blacks and of women. The contention is simply that in those years no judge had designated a black or a woman to act as foreman.⁵

In the context of a state grand jury, this question was presented to the Supreme Court in Rose v. Mitchell, 443 U.S. 545 (1979). The Supreme Court, however,

6. We are informed that since the grand jury indicated Hobby and Levi there have been black grand jury foremen in the Eastern District of North Carolina.

found it unnecessary to decide whether or not a reversal of the conviction was required upon a showing of discrimination in the selection of grand jury foremen, for it found an insufficient showing of any such discrimination.

In Ice v. Fortenberry, 661 F.2d 496 (5th Cir. 1981) (en banc), the court held that discrimination in the selection of a foreman of a state grand jury required vacation of the conviction just as would a taint affecting the selection of all of the grand jurors. The Eleventh Circuit, in United States v. Perez-Hernandez, 672 F.2d 1380 (11th Cir. 1982), came to the same conclusion, though the case involved discrimination in the selection of the foremen of federal grand juries.⁶

6. Similar problems have been presented to other courts. See, e.g., Williams v. Mississippi, 608 F.2d 1021 (5th Cir. 1979);
(cont.)

The question which the Supreme Court deliberately did not decide in Rose v. Mitchell was much more debatable than the one with which we are confronted. Involved there was alleged discrimination in the selection of grand jury foremen in Tennessee. In that state the foreman was selected by the judge from the eligible population at large, not from just those drawn to serve. He serves a two-year term, during which he has considerably more authority than that of the presiding officer. He is authorized to assist prosecutors in investigating crime and to order the issuance of subpoenas to witnesses. An indictment is fatally defective unless it bears the foreman's signature. 443 U.S. at 548 n.1.

United States v. Cross, 516 F. Supp. 700 (M.D. Ga. 1981); United States v. Manbeck, 514 F. Supp. 141 (S.C. 1981); United States v. Holman, 510 F. Supp. 1175 (S.D. (cont.)

The foreman of a federal grand jury is selected after the grand jury has been impaneled from among those who have impaneled. His only duties are ministerial. He has no special powers or duties, beyond those borne by every grand juror, that meaningfully affect the rights of persons charged with crime. The failure of a federal grand jury foreman to carry out those ministerial duties placed upon him by F.R.Cr.P. 6(c) generally will not invalidate an indictment. See, e.g., Frisbie v. United States, 157 U.S. 160 (1895).

The impact of the federal grand jury foreman, as distinguished from that of any other grand juror, upon the criminal justice system and the rights of persons charged with crime is minimal

(Fla. 1981); United States v. Jenison, 485 F. Supp. 655 (S.D. Fla. 1979).

and incidental at best. Any suspicion that his office may enlarge his capacity to influence other grand jurors is too vague and uncertain to warrant dismissal of indictments and reversals of convictions.

The roles of grand jury foremen in the federal system differ substantially from the roles of grand jury foremen in Tennessee and other states. Federal grand jury foremen are without the significant powers authorized for Tennessee grand jury foremen. Their role is so little different from that of any other grand juror that the rights of defendants are adequately protected by assurance that the composition of the grand jury as a whole cannot be the product of discriminatory selection.

We respectfully disagree with the contrary conclusion of the Eleventh

Circuit in Perez-Hernandez.

III.

Finding no merit in any of the other contentions of the defendants, their convictions are affirmed.

AFFIRMED.

No. 82-2140

Office - Supreme Court, U.S.

FILED

FEB 21 1984

IN THE SUPREME COURT OF THE UNITED STATES

ALEXANDER L. STEVENS
CLERK

OCTOBER TERM, 1983

WILBUR HOBBY,

PETITIONER,

v.

UNITED STATES,

RESPONDENT

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
FOURTH CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED JUNE 28, 1983
CERTIORARI GRANTED DECEMBER 12, 1983

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CERTIORARI GRANTED DECEMBER 12, 1983

In The
 SUPREME COURT OF THE UNITED STATES
 October Term, 1983

No. 82-2140

WILBUR HOBBY,

Petitioner

v.

United States of America,
 Respondent,

On Writ of Certiorari
 To The United States Court of Appeals
 For The Fourth Circuit

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James M. O'Reilly

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RELEVANT DOCKET ENTRIES

February 10, 1981. Indictment filed.

April 3, 1981. Motion of Defendant Hobby
to Dismiss Indictment Due
to Improper Selection of
Grand Juries.

June 19, 1981. Superceding Indictment filed.

July 10, 1981. Order denying motion to
dismiss.

July 1, 1981. Hearings on Motion to Dismiss.

July 10, 1981. Order denying motion to
dismiss.

December 7-
18, 1981. Trial Before the Honorable W.
Earl Britt

December 19, 1981. Jury Verdict of Guilty.

December 29, 1981. Sentence of the Court.

December 29, 1981. Motion for Arrest Of
Judgment.

February 11, 1982. Order Denying the Motion
for Arrest of Judgment

February 12, 1982. Notice of Appeal Filed

March 9, 1983. Judgment and opinion of
Fourth Circuit entered.

April 29, 1983. Petition for rehearing
and suggestion for
rehearing en banc denied

June 28, 1983. Petition for Writ of
Certiorari Filed

December 12, 1983. Order of Supreme Court
granting certiorari.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

No. 81-5-CR-5

No. 81-6-CR-5

UNITED STATES	:	RESPONSE TO
		DEFENDANT HOBBY'S
OF AMERICA	:	MOTION TO DISMISS
		THE INDICTMENT
- vs -	:	DUE TO IMPROPER
		SELECTION OF
WILBUR HOBBY	:	<u>GRAND JURORS</u>

Now comes the United States by and through the United States Attorney for the Eastern District of North Carolina and responds to the defendant's Motion to Dismiss the Indictment Due to Improper Selection of Grand Jurors filed herein as follows:

The Government denies all allegations made by the defendant in his Motion with regard to the jury selection process in the United States District Court for the Eastern District of North Carolina.

Title 28, United States Code, Section

1863, provides that each United States District Court shall devise and place into operation a written plan for the random selection of grand and petit jurors. In July, 1968, the Honorable John D. Larkins, Jr., United States District Judge, submitted a plan for the random selection of jurors, which plan was approved by the Judicial Council and placed into effect. In addition, the Judicial Council approved amendments to the plan for the random selection of jurors and said amendments were placed into effect.

Section 2 of the plan calls for the selection of jurors to be made publicly at random from the list of all persons actually voting in the last general election held in the political subdivisions of the counties within the respective divisions. This is in accord with Title 28, United States Code, Section 1863(b)(2), which provides as follows:

Among other things, such plan shall -- specify whether the names of prospective jurors shall be selected from the voter registration list or the list of actual voters of the political subdivisions within the district or division.

Moreover, the case law has consistently held that the exclusion of non-voters from juries does not impair the cross-sectional aspect of such juries. United States v. Gast, 457 F.2d 141, 142 (7th Cir. 1972), cert. denied, 406 U.S. 969; United States v. Butera, 420 F.2d 564, 573 (1st Cir. 1970); Camp v. United States, 413 F.2d 419, 421 (5th Cir. 1969); United States v. Guzman, 337 F.Supp. 140, 144-145 (D.C. N.Y. 1972), affirmed 468 F.2d 1245 (2d Cir. 1972), cert. denied, 410 U.S. 937 (1973).

Various courts have rejected the argument that approximately proportional representation of the various identifiable groups in the community is required. If

it can be obtained by random selection, proportional representation may be the ideal, because it is the ultimate opposite to intentional exclusion, but it can be achieved only rarely, and then only in regard to some but not all, of relevant criteria. Substantial representation is all that is required. United States v. McVean, 436 F.2d 1120, 1122 (5th Cir. 1971); United States v. Butera, 420 F.2d 564 (1st Cir. 1970); United States v. Di Tomaso, 405 F.2d 385, 390 (4th Cir. 1968). As the Butera court stated:

The Supreme Court has consistently required that jury selection systems draw their jurors from a fair cross-section of the community. It has been suggested that such non-discriminatory jury selection is an essential aspect of our democratic form of government. However, the Court has long recognized that fair and reasonable qualifications for jury service eligibility can be imposed even though they detract from a cross section in the actual jury pools. Moreover, the Court has recognized

that it is neither possible nor necessary -- in order to insure an impartial jury -- that there be a fair cross section of the community on each individual grand and petit jury. 420 F.2d at 567. (footnotes omitted).

While the cross-section concept is firmly embedded in the law, the Constitution does not entitle a defendant to a venire that perfectly mirrors the community or accurately reflects the proportionate strength of every identifiable group. Swain v. Alabama, 380 U.S. 202, 205-209 (1965); Grech v. Wainwright, 492 F.2d 747, 749 (5th Cir. 1974); Thompson v. Sheppard, 490 F.2d 830, 833 (5th Cir. 1974); United States v. Greene, 489 F.2d 1145, 1149 (D.C. Cir. 1973); United States v. Alba-Conrado, 481 F.2d 1266, 1270 (5th Cir. 1973); United States v. Fernandez, 480 F.2d 726, 733 (2nd Cir. 1973); United States v. Canty, 422 F.2d 358 (4th Cir. 1970); United States v. Troplano. 418 F.2d 1069 (2d

Cir. (1969), cert. denied, 397 U.S. 1021.

The claimant pressing a Constitutional challenge bears the burden of setting forth specific facts showing a systematic exclusion of a cognizable class of qualified citizens. The claimant has the burden of showing, prima facie, discriminatory selection practices. The claimant must show that the selection method resulted in the discrimination against distinct groups in the general population. 420 F.2d 564. Purposeful discrimination in jury selection may not be assumed or merely asserted; it must be proven. Mobley v. United States, 379 F.2d 768 (5th Cir. 1967).

The Government submits that the plan adopted by the United States District Court for the Eastern District of North Carolina is in full conformity with the requirements of law in using the actual voter lists as prescribed in Title 28,

United States Code, Section 1863, and no other source names was necessary to foster the policy and protect the right secured by any section of the Jury Reform Act.

United States v. James Earl Grant, Jr., 471 F.2d 648 (4th Cir. 1973) (per curiam); United States v. Grant, 475 F.2d 581 (4th Cir. 1973).

The defendant's motion makes broad allegations and contends absolutely no evidence to substantiate those allegations. Since defendant's burden of proof has not been met, defendant's Motion to Dismiss the Indictment Due to Improper Selection of Grand Jurors is completely without merit and should be denied.

Respectfully submitted, this is the 4th day of May, 1981.

JAMES L. BLACKBURN
United States Attorney

BY: SUZANNE L. JOWDY
Assistant United States Attorney
Criminal Section

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
NORTH CAROLINA
RALEIGH DIVISION

No. 81-5-01-CR-5

No. 81-5-02-CR-5

UNITED STATES OF	:	
	:	
v.	:	<u>INDICTMENT</u>
	:	
WILBUR HOBBY	:	
MORT LEVI	:	

The Grand Jury charges:

FIRST COUNT

That from on or about the 23rd day of January, 1979 and continuously thereafter up to and including on or about the 11th of January, 1980, in the Eastern District of North Carolina, WILBUR HOBBY and MORT LEVI willfully and knowingly did combine, conspire, confederate and agree with each other to defraud the United States of funds and monies with respect to the United States Department of Labor Grant Number 37-9-0500-10 from the Division of

18,
U.S.C.,
Sec.
371

Community Employment, North Carolina Department of Natural Resources and Community Development, payable to Precision Graphics, Inc., contrary to and in violation of the provisions of Title 18, United States Code, Section 371.

OVERT ACTS

In furtherance of the conspiracy and to effect the object thereof, the defendants performed the following overt acts:

1. On or about the 29th day of January, 1979, MORT LEVI, naming himself as a registered agent, filed or caused to be filed with the North Carolina Secretary of State, Articles of Incorporation of Precision Data Institute, Inc., which document stated in part that the purpose of the corporation was "to engage in the business of data processing, storing, retrieving, compiling and computing data, selling, distributing and organizing various data and training persons to

quickly attain proficiency in operating data system equipment."

2. On or about the 8th day of February, 1979, MORT LEVI, representing Precision Data Institute, Inc., prepared and submitted or caused to be submitted a Grant Request for Training Data Processing Personnel to the "North Carolina Department of Economic and Natural Resources."

3. On or about the 10th day of April, 1979, WILBUR HOBBY, Treasurer of Precision Data Institute, Inc., and owner of approximately 95% of its stock, signed an agreement with Mohawk Data Sciences for the purchase of the following Mohawk Data Sciences equipment: one (1) #21/40 Application Processing System, including (1) Controller Console (M.2102), (1) Operator Station (M.2192), (1) Diskette Drive (F.2171), (1) Dual Station Controller (F.191); one (1) #F164 16K

Additional Memory; one (1) #F191 Dual Station Controller; three (3) #2171 Diskette Drives; three (3) #2192 Operator Stations; one (1) #2174/704 10 MB Disk Drive (External); one (1) #2142-1 Line Printer, 96 Character Set 132 Print Positions; and four (4) #F101 Operator Station Tables.

The total purchase price was \$36,572.00 and was paid in twenty-four (24) equal monthly installments of \$1,721.57 for a total purchase price of \$41,317.68. The buyer of the above-named equipment was listed as Precision Data Institute, Inc.

4. On or about the 10th day of April, 1979, WILBUR HOBBY, Treasurer of Precision Data Institute, Inc., and owner of approximately 95% of its stock, signed a "Maintenance Service Agreement for Customer-Owned MDS Equipment" with Mohawk Data Services for the equipment referred

to in Paragraph 3 for a total monthly maintenance charge of \$214.00. The buyer of this service agreement was listed as Precision Data Institute, Inc.

5. On or about the 26th day of April, 1979, WILBUR HOBBY opened a checking account in the name of Precision Data Institute, Inc. with North Carolina National Bank at Raleigh, North Carolina designating himself as Treasurer of Precision Data Institute, Inc. and the only authorized individual to sign on that account.

6. Between on or about the 1st day of May, 1979 and on or about the 28th day of August, 1979, MORT LEVI sought to recruit necessary students for classes in keypunch operator training. On various occasions, MORT LEVI advised certain prospective students to use false residential addresses if necessary to meet eligibility requirements and also advised certain

prospective students not to give the necessary previous unemployment information on the application forms if by so doing the prospective students would fail to meet certain eligibility requirements.

7. On or about the 10th day of May, 1979, MORT LEVI, as Program Director for Precision Graphics, Inc., wrote or caused to be written, a memorandum to the Property Officer for the Division of Community Employment of the North Carolina Department of Natural Resources and Community Development stating that Precision Graphics, Inc. was "without any equipment" and wanted authorization for purchase and leasing of equipment.

8. On or about the 21st day of May, 1979, WILBUR HOBBY wrote a check on the checking account of Precision Data Institute, Inc., referred to in Paragraph 5, in the amount of \$3,000.00 to James

Earl Trammell for a 1974 Mercury - 4266A523984. At this time, sufficient funds in the checking account did not exist to cover this check, and for the statement period ending May 31, 1979 a balance of minus \$29.85 existed.

9. On or about the 21st day of May, 1979, WILBUR HOBBY, as President of Precision Graphics, Inc., signed a contract with the Division of Community Employment, North Carolina Department of Natural Resources and Community Development, in the amount of \$129,429.00 for a contract period to begin on May 21, 1979 and to end by September 30, 1979, such contract to be financed under the Comprehensive Employment and Training Act of 1973. A representative of the North Carolina Department of Natural Resources and Community Development signed the contract on or about May 24, 1979.

10. On or about the 21st day of May, 1979, WILBUR HOBBY, representing Precision Graphics, Inc., and James E. Trammell, representing Precision Data Institute, Inc., signed an agreement whereby Precision Data Institute, Inc. agreed "to rent to Precision Graphics, Inc., for its program to train Data Entry Operators" the computer equipment referred to in Paragraph 3, "at the rate of \$12.50 per hour with the agreed on schedule of five (5) days per week for two (2) separate classes of six (6) hours per day for each class." Such payment was subsequently made by Precision Graphics, Inc. to Precision Data Institute, Inc.

11. On or about the 21st day of May, 1979, WILBUR HOBBY, representing Precision Graphics, Inc., and James E. Trammell, representing Precision Data Institute, Inc., signed an agreement whereby Precision Data Institute, Inc. agreed to

furnish maintenance on the computer equipment referred to in Paragraph 3 for the sum of \$125.00 per week. Such payment was subsequently made by Precision Graphics, Inc. to Precision Data Institute, Inc.

12. On or about the 23rd day of May, 1979, MORT LEVI, representing Precision Graphics, Inc., requested or caused to be requested from the Division of Community Employment an advance of funds in the amount of \$43,696.00, such advance being approved on May 25, 1979.

13. On or about the 29th day of May, 1979, WILBUR HOBBY wrote a check to Mohawk Data Science, Inc. in the amount of \$10,329.42 on the Precision Data Institute, Inc. checking account referred to in Paragraph 5. The check was listed as payment for the "21/40" Series," the computer equipment referred to in Paragraph 3. On or about the 29th day of

May, 1979, sufficient funds to cover this check did not exist in the Precision Data Institute, Inc. checking account, and the ending balance as of May 31, 1979 was minus \$29.85.

14. Between on or about the 21st day of May, 1979 and on or about the 10th day of October, 1979, WILBUR HOBBY charged and was reimbursed approximately \$3,000.00 for the rental of certain computer equipment, referred to in Paragraph 3, for the period of on or about May 21, 1979 through on or about June 15, 1979, when in fact such computer equipment was not functionally operational at Precision Graphics, Inc. until on or about June 15, 1979.

15. Between on or about the 30th day of May, 1979 and the 4th day of June, 1979, WILBUR HOBBY deposited the \$43,696.00 check advance from the North Carolina Department of Natural Resources

and Community Development into the Precision Graphics, Inc. checking account at Mechanics and Farmers Bank and subsequently withdrew approximately \$18,000.00 from that checking account at North Carolina National Bank, the account referred to in Paragraph 5. The checks referred to in Paragraphs 8 and 13 were subsequently deposited and paid out of the Precision Data Institute, Inc. checking account referred to above.

16. Between on or about the 29th day of June, 1979 and the 11th day of January, 1980, WILBUR HOBBY transferred out of the Precision Graphics, Inc. checking account at Mechanics and Farmers Bank approximately \$432,000.00 and deposited that same amount into the Precision Data Institute, Inc. checking account at North Carolina National Bank, the account referred to in Paragraph 5, Precision Graphics, Inc. having received another

cash advance of approximately \$50,857.00 on or about July 30, 1979 from the North Carolina Department of Natural Resources and Community Development, such cash advance having been requested or caused to be requested by MORT LEVI.

17. Between on or about the 4th day of June, 1979 and on or about the 11th day of January, 1980, WILBUR HOBBY made or caused to be made loans of money and payments and purchases on or of various items by Precision Data Institute, Inc. in the amount of approximately \$29,000.00.

Said acts and other overt acts not now known to the Grand Jury being committed in the furtherance of said conspiracy to violate the provisions of Title 18, United States, Code, Section 371.

SECOND COUNT

That between on or about the 1st day of May, 1979 and on or about the 28th day of August, 1979, MORT LEVI, Program Director

of Precision Graphics, Inc., an agency receiving financial assistance under the Comprehensive Employment and Training Act, did knowingly hire ineligible individuals for training in a program established under the United States Department of Labor Grant Number 37-9-0500-10 from the North Carolina Department of Natural Resources and Community Development to Precision Graphics, Inc., a grant or contract of assistance pursuant to the Comprehensive Employment and Training Act, in violation of the provisions of Title 18, United States Code, Section 665.

THIRD COUNT

That between on or about the 21st day of May, 1979 and on or about the 10th day of October, 1979, WILBUR HOBBY, President of Precision Graphics, Inc., an agency receiving financial assistance under the Comprehensive Employment and Training Act, did willfully misapply and did obtain by

fraud approximately \$1,840.00 relating to computer maintenance of the monies and funds which were the subject of United States Department of Labor Grant Number 37-9-0500-10 from the North Carolina Department of Natural Resources and Community Development to Precision Graphics, Inc., a grant or contract of assistance pursuant to the Comprehensive Employment and Training Act, in violation of the provisions of Title 18, United States Code, Section 665.

FOURTH COUNT

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That between on or about the 29th of May, 1979 and on or about the 10th of May, 1980, WILBUR HOBBY, President of Precision Graphics, Inc., an agency receiving financial assistance under the Comprehensive Employment and Training Act, did willfully misapply and obtain by fraud approximately \$25,000.00 of the monies and funds which were the subject of United

States Department of Labor Grant Number 37-9-0500-10 from the North Carolina Department of Natural Resources and Community Development to Precision Graphics, Inc., a grant or contract of assistance pursuant to the Comprehensive Employment and Training Act, by purchasing from and making payments to Mohawk Data Sciences, in the name of Precision Data Institute, Inc., the following Mohawk Data Sciences equipment: one (1) #21/40 Application Processing System, including (1) Controller Console (M.2102), and (1) Operator Station (M.2192), (1) Diskette Drive (F.2171), (1) Dual Station Controller (F.191); one (1) #F164 16K Additional Memory; one (1) #F191 Dual Station Controller; three (3) #2171 Diskette Drives; three (3) #2192 Operator Stations; one (1) #2174/704 10 MB Disk Drive (External); one (1) #2142-1 Line Printer, 96 Character Set 132 Print

Positions; and four (4) #F101 Operator Station Tables, in violation of the provisions of Title 18, United States Code, Section 665.

FIFTH COUNT

That between on or about the 29th day of May, 1979 and on or about the 10th day of May, 1980, WILBUR HOBBY, President of Precision Graphics, Inc., an agency receiving financial assistance under the Comprehensive Employment and Training Act, did willfully misapply and obtain by fraud approximately \$25,000.00 of the monies and funds which were the subject of United States Department of Labor Grant Number 37-9-0500-10 from the North Carolina Department of Natural Resources and Community Development to Precision Graphics, Inc., a grant or contract of assistance pursuant to the Comprehensive Employment and Training Act, by purchasing from and making payments to Mohawk Data

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Sciences, in the name of Precision Data Institute Inc., the following Mohawk Data Sciences equipment: one (1) #21/40 Application Processing System, including (1) Controller Console (M.2102), (1) Operator Station (M.2192), (1) Diskette Drive (F.2171), (1) Dual Station Controller (F.191); one (1) #F164 16K Additional Memory; one (1) #F191 Dual Station Controller; three (3) #2171 Diskette Drives; three (3) #2191 Operator Stations; one (1) #2174/704 10 MB Disk Drive (External); one (1) #2142-1 Line Printer, 96 Character Set 132 Print Positions; and four (4) #F101 Operator Station Tables, in violation of the provisions of Title 18, United States Code, Section 665.

FIFTH COUNT

That between on or about the 21st day of May, 1979 and on or about the 10th day of October, 1979, WILBUR HOBBY,

President of Precision Graphics, Inc., an agency receiving financial assistance under the Comprehensive Employment and Training Act, did willfully misapply and obtain by fraud approximately \$3,000.00 of the monies and funds which were the subject of United States Department of Labor Grant Number 37-9-0500-10 from the North Carolina Department of Natural Resources and Community Development to Precision Graphics, Inc., a grant or contract of assistance pursuant to the Comprehensive Employment and Training Act, by charging for and being reimbursed for rental of certain data processing equipment for the period of on or about May 21, 1979 through on or about June 15, 1979, when such data processing equipment was not in fact functionally operational until on or about June 15, 1979, in violation of the provisions of Title 18, United States Code, Section 665.

A TRUE BILL

FOREMAN

UNITED STATES ATTORNEY

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA

Raleigh Division

UNITED STATES OF	)	NOS. 81-5-CR-5
AMERICA,	)	81-6-CR-5
)	
Plaintiff,	)	DEFENDANT HOBBY'S
	)	<u>MOTION TO DISMISS</u>
vs.	)	<u>THE INDICTMENT DUE</u>
	)	<u>TO IMPROPER SELEC-</u>
WILBUR HOBBY,	)	<u>TION OF GRAND</u>
	)	<u>JURORS</u>
<u>et al.</u> ,)	
	)	(Rule 6, Fed. R.
Defendants	)	Crim. P.)

SIRS:

PLEASE TAKE NOTICE that pursuant to the Fifth and Sixth Amendments to the United States Constitution, 28 U.S.C. § 1867, Rule 6 of the Federal Rules of Criminal Procedure, and the Jury Plan for the Eastern District of North Carolina (hereinafter "Plan"), Defendant HOBBY moves this Court for an Order dismissing both above indictments due to improper selection of grand jurors, to wit:

1. The administration of the Plan has failed to ensure grand juries selected at random from a fair cross-section of the community within the District, in violation of 28 U.S.C. § 1861.

2. The administration of the Plan has failed to ensure that all citizens have the opportunity to serve as jurors when summoned and that they actually serve as jurors when summoned for that purpose, in violation of 28 U.S.C. § 1861.

3. The administration of the Plan excludes citizens from service as grand jurors on account of race, color, economic status and occupation, in violation of 28 U.S.C. § 1862 and the Fifth and Sixth Amendments of the United States Constitution.

4. The administration of the Plan excludes citizens from service as grand jurors on account of age, and otherwise fails adequately to represent a fair

cross-section of the community, in violation of the Fifth and Sixth Amendments of the United States Constitution.

5. The administration of the Plan fails to ensure that all political subdivisions within the District are substantially proportionately represented, in violation of 28 U.S.C. § 1863(b)(3) and the Fifth and Sixth Amendments of the United States Constitution.

6. Lists of actual voters are not adequate as a sole source of names for the master jury wheel to foster the policy and protect the rights secured by the Jury Act, and no supplemental sources were used, in violation of 28 U.S.C. § 1863(b)(2) and the Fifth and Sixth Amendments of the United States Constitution.

Defendant HOBBS files this Motion now prior to receiving access to any records

necessary to fully discern all grounds which might be urged herein, in order to comply with the Order setting April 3, 1981 as the date by which all pretrial motions must be filed. At such time as he receives access to the necessary records, he respectfully reserves his right to amend this Motion, file the required sworn statement pursuant to 28 U.S.C. § 1867 (d), a supporting memorandum of law, and request that a date be set for a hearing.

This the 3rd day of April, 1981.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

No. 81-5-01-CR-5

No. 81-5-02-CR-5

UNITED STATES	:
OF AMERICA	: <u>I N D I C T M E N T</u>
	: (Superseding)
v.	:
	:
WILBUR HOBBY	:
MORT LEVI	:

The Grand Jury charges that:

1. On or about the 28th day of December, 1973, the Congress of the United States of America enacted the Comprehensive Employment and Training Act of 1973 (hereinafter the "Act") to provide job training and employment opportunities for economically disadvantaged, unemployed, and underemployed persons, and to assure that training and other services lead to maximum employment opportunities and enhance self-sufficiency by establishing a flexible and decentralized system of Federal, State and local programs.

2. The Comprehensive Employment and Training Act and subsequent amendments thereto authorized the United States Department of Labor, an agency of the United States, to carry out the provisions of the Act and appropriated such funds as necessary to that purpose.

3. The Act and subsequent amendments thereto authorized the Secretary of Labor to make financial assistance available to a "Prime Sponsor" to enable it to carry out the Act. A "Prime Sponsor" is defined to include "a State," or portion thereof.

4. The State of North Carolina at all times relevant in this Indictment was a "Prime Sponsor" and acted through the Division of Community Employment of the North Carolina Department of Natural Resources and Community Development to receive the allocation of funds from the Secretary of Labor and otherwise administer the Comprehensive Employment

Training programs consistent with the Act.

5. Pursuant to the Act and applicable regulations, an allocation of funds from the Secretary of Labor was made to the State of North Carolina, as a Prime Sponsor, under the United States Department of Labor Grant Number 37-9-0500-10. *

6. The State of North Carolina, acting as a Prime Sponsor, through the Division of Natural Resources and Community Development entered into Contract Number 1950009J02 with Precision Graphics, Inc. to perform certain technical or professional services in connection with a program to be financed by the above United States Department of Labor grant. The contract was subject to the Act and applicable regulations.

7. By the terms of that contract, the State of North Carolina, as a Prime

Sponsor, agreed, subject to availability of federal funds under the above-referenced United States Department of Labor grant, to pay Precision Graphics, Inc., as a Contractor, upon receipt of proper documentation, for allowable costs properly incurred in performing the services provided under the Contract. Other than the reimbursement of these allowable costs, no further compensation or profit was payable to Precision Graphics, Inc., as Contractor.

8. At all times relevant in this Indictment, pursuant to Contract Number 1950009J02, the Act, and applicable regulations, allowable costs were limited to those expenditures necessary and reasonable for the proper and efficient administration of the grant program.

9. At all times relevant in this Indictment, WILBUR HOBBY was the President and Chief Executive of Precision Graphics,

Inc.

10. At all times relevant in this Indictment, WILBUR HOBBY was the Treasurer and owner of 95% of the stock of Precision Data Institute, Inc., and MORT LEVI was the registered agent, an incorporator, and a director of Precision Data Institute, Inc.

11. At all times relevant in this Indictment, and pursuant to Contract Number 1950009J02, the Act, and applicable regulations, all property purchased with funds received pursuant to said contract were to become the property of the State of North Carolina unless the United States Department of Labor elected to retain ownership. Acquisition of any property items having a unit cost of \$1,000.00 or more must have been approved by the United States Department of Labor before it could be approved by the Prime Sponsor.

12. At all times relevant in this

Indictment, and pursuant to Contract Number 1950009J02, the Act, and applicable regulations, Precision Graphics, Inc., as Contractor, was not entitled to funds to cover the costs of any purchased or leased property, other than expendable supplies, unless prior written authorization of the Prime Sponsor for each purchase or lease was obtained.

13. At all times relevant in this Indictment, and pursuant to Contract Number 1950009J02, the Act, and applicable regulations, transfers of materials, supplies, and services between Precision Graphics, Inc. and Precision Data Institute, Inc. were required to be on the basis of cost incurred.

14. The allegations of Paragraphs 1 through 13 above are hereby alleged and incorporated as though set forth in full in Counts 1 through 5.

FIRST COUNT

From on or about the 23rd day of January, 1979 and continuously thereafter up to and including on or about the 11th day of January, 1980, in the Eastern District of North Carolina, WILBUR HOBBY and MORT LEVI willfully and knowingly did combine, conspire, confederate and agree with each other to defraud the United States of funds and monies, in violation of the provisions of Title 18, United States Code, Section 665, said funds and monies being appropriated and allocated to Precision Graphics, Inc., pursuant to United States Department of Labor Grant Number 37-9-0500-10 from the Division of Community Employment, North Carolina Department of Natural Resources and Community Development, in that WILBUR HOBBY and MORT LEVI did use said funds and monies to purchase computer equipment and computer maintenance services on behalf

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of and in the name of Precision Data Institute, Inc., resulting in unlawful profits to Precision Data Institute, Inc., in violation of Contract Number 1950009J02, contrary to and in violation of the provisions of Title 18, United States Code, Section 371.

OVERT ACTS

In furtherance of the conspiracy and to effect the object thereof, the defendants performed the following overt acts:

1. On or about the 29th day of January, 1979, MORT LEVI, naming himself as registered agent, filed or caused to be filed with the North Carolina Secretary of State, Articles of Incorporation of Precision Data Institute, Inc., which document stated in part that the purpose of the corporation was "to engage in the business of data processing, storing, retrieving, compiling and computing data,

selling, distributing and organizing various data and training persons to quickly attain proficiency in operating data system equipment."

2. On or about the 8th day of February, 1979, MORT LEVI, representing Precision Data Institute, Inc., prepared and submitted or caused to be submitted a Grant Request for Training Data Processing Personnel to the North Carolina Department of Natural Resources and Community Development, said request having never been funded.

3. Between on or about the 27th day of March, 1979, and on or about the 25th day of April, 1979, WILBUR HOBBY or MORT LEVI, or both, representing Precision Graphics, Inc. prepared and submitted or caused to be submitted a Grant Request for Training Data Processing Personnel to the North Carolina Department of Natural Resources and Community Development.

4. On or about the 21st day of May, 1979, WILBUR HOBBY, as President of Precision Graphics, Inc., signed Contract Number 1950009J02 in the amount of approximately \$129,429.00 for a contract period to begin on May 21, 1979 and to end by September 30, 1979, such contract to be financed under the Comprehensive Employment and Training Act of 1973. A representative of the North Carolina Department of Natural Resources and Community Development signed the contract on or about May 24, 1979.

5. On or about the 10th day of April, 1979, WILBUR HOBBY, Treasurer of Precision Data Institute, Inc., and owner of approximately 95% of its stock, signed, on behalf of and in the name of Precision Data Institute, Inc., an agreement with Mohawk Data Sciences for the purchase of the following Mohawk Data Sciences equipment: one (1) #21/40 Application

Processing System, including one (1)
Controller Console (M.2102), one (1)
Operator Station (M.2192), one (1)
Diskette Drive (F.2171), one (1) Dual
Station Controller (F.191); one (1) #F164
16K Additional Memory: one (1) #F191 Dual
Station Controller; three (3) #2171
Diskette Drives; three (3) #2192 Operator
Stations; one (1) #2174/704 10 MB Disk
Drive (External); one (1) #2142-1 Line
Printer, 96 Character Set 132 Print
Positions; and four (4) #F101 Operator
Station Tables.

The total purchase price was
approximately \$36,572.00 and was to be
paid in twenty-four (24) equal monthly
installments of approximately \$1,721.57
for a total purchase price of
approximately \$41,317.68. The buyer of
the above-named equipment was listed as
Precision Data Institute, Inc.

6. On or about the 10th day of April,

1979, WILBUR HOBBY, Treasurer of Precision Data Institute, Inc., and owner of approximately 95% of this stock, signed a "Maintenance Service Agreement for Customer-Owned MDS Equipment" with Mohawk Data Sciences for the equipment referred to in Overt Act 5 for a total monthly maintenance charge of approximately \$214.00. The buyer of this service agreement was listed as Precision Data Institute, Inc.

7. On or about the 26th day of April, 1979, WILBUR HOBBY opened a checking account in the name of Precision Data Institute, Inc. with North Carolina National Bank at Raleigh, North Carolina designating himself as Treasurer of Precision Data Institute, Inc. and the only authorized individual to sign on that account.

8. Between on or about the 1st day of May, 1979 and on or about the 28th day of

May, 1979, MORT LEVI, on behalf of Precision Graphics, Inc., sought to recruit necessary students for classes in keypunch operator training. On various occasions, MORT LEVI advised certain prospective students to use false residential addresses if necessary to meet eligibility requirements and also advised certain prospective students not to give the necessary previous unemployment information on the application forms if by so doing the prospective students would fail to meet certain eligibility requirements.

9. On or about the 10th day of May, 1979, MORT LEVI, as Program Director for Precision Graphics, Inc., wrote or caused to be written, a memorandum to the Property Officer for the Division of Community Employment of the North Carolina Department of Human Resources and Community Development stating that

Precision Graphics, Inc. was "without any equipment" and wanted authorization for purchase and leasing of equipment.

10. On or about the 21st day of May, 1979, WILBUR HOBBY, representing Precision Graphics, Inc., and James E. Trammell, representing Precision Data Institute, Inc., signed an agreement whereby Precision Data Institute, Inc. agreed "to rent to Precision Graphics, Inc., for its program to train Data Entry Operators" the computer equipment referred to in Overt Act 5, "at the rate of \$12.50 per hour with the agreed on schedule of five (5) days per week for two (2) separate classes of six (6) hours per day for each class." Such payment was subsequently made by Precision Graphics, Inc. to Precision Data Institute, Inc.

11. On or about the 21st day of May, 1979, WILBUR HOBBY, representing Precision Graphics, Inc., and James E. Trammell,

representing Precision Data Institute, Inc., signed an agreement whereby Precision Data Institute, Inc., agreed to furnish maintenance on the computer equipment referred to in Overt Act 5 for the sum of approximately \$125.00 per week. Such payment was subsequently made by Precision Graphics, Inc. to Precision Data Institute, Inc.

12. On or about the 23rd day of May, 1979, MORT LEVI, representing Precision Graphics, Inc., requested or caused to be requested from the Division of Community Employment an advance of funds in the amount of approximately \$43,696.00, such advance being approved on May 25, 1979.

13. On or about the 29th day of May, 1979, WILBUR HOBBY wrote a check to Mohawk Data Sciences, Inc. in the amount of \$10,329.42 on the Precision Data Institute, Inc. checking account referred to in Overt Act 7. The check was listed

as payment for the "21/40 Series," the computer equipment referred to in Overt Act 5.

14. Between on or about the 21st of May, 1979 and on or about the 10th day of October, 1979, WILBUR HOBBY on behalf of and in the name of Precision Data Institute, Inc., charged to Precision Graphics, Inc. and was reimbursed by Precision Graphics, Inc. approximately \$3,000.00 for the rental of certain computer equipment, referred to in Overt Act 5, for the period of on or about May 21, 1979 through on or about June 15, 1979, when in fact such computer equipment was not functionally operational at Precision Graphics, Inc. until on or about June 15, 1979.

15. Between on or about the 30th of May, 1979 and the 4th day of June, 1979, WILBUR HOBBY deposited or caused to be deposited the approximately \$43,696.00

check advance, referred to in Overt Act 12, which was from the North Carolina Department of Natural Resources and Community Development, into the Precision Graphics, Inc. checking account at Mechanics and Farmers Bank and subsequently withdrew approximately \$18,000.00 from that checking account and deposited it into the Precision Data Institute, Inc. checking account at North Carolina National Bank, the account referred to in Overt Act 7. The check referred to in Overt Act 13 was subsequently paid out of the Precision Data Institute, Inc. checking account referred to above.

16. Between on or about the 29th day of June, 1979 and the 11th day of January 1980, WILBUR HOBBY transferred out of the Precision Graphics, Inc. checking account at Mechanics and Farmers Bank approximately \$32,000.00 and deposited

that same amount into the Precision Data Institute, Inc. checking account at North Carolina National Bank, the account referred to in Overt Act 7. Precision Graphics, Inc. having received another cash advance of approximately \$50,857.00 on or about July 30, 1979 from the North Carolina Department of Natural Resources and Community Development, such cash advance having been requested or caused to be requested by MORT LEVI.

Said acts and other overt acts not now known to the Grand Jury being committed in the furtherance of said conspiracy to violate the provisions of Title 18, United States Code, Sections 371 and 665.

SECOND COUNT

That between on or about the 1st day of May, 1979 and on or about the 28th day of August, 1979, in the Eastern District of North Carolina, MORT LEVI, in his capacity as Program Director of Precision

Graphics, Inc., did knowingly hire ineligible individuals for training in a program established under United States Department of Labor Grant Number 37-9-0500-10, Contract Number 1950009J02, in violation of the provisions of Title 18, United States Code, Section 665.

THIRD COUNT

That between on or about the 21st day of May, 1979, in the Eastern District of North Carolina, WILBUR HOBBY, President of Precision Graphics, Inc., did willfully misapply and did obtain by fraud approximately \$1,840.00 relating to computer maintenance, that is, WILBUR HOBBY through Precision Data Institute, Inc. did enter into a contract with Mohawk Data Sciences, whereby Mohawk Data Sciences agreed to provide computer maintenance service for the equipment described in Overt Act 5, Count 1 of this Indictment, at the rate of approximately

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\$214.00 per month and WILBUR HOBBY, representing Precision Graphics, Inc., entered into an agreement with Precision Data Institute, Inc. whereby Precision Data Institute, Inc. agreed to furnish maintenance for the same computer equipment referred to in Overt Act 5, Count 1 of this Indictment, at the rate of approximately \$125.00 per week, resulting in an unlawful profit of approximately \$1,840.00 to WILBUR HOBBY, through Precision Data Institute, Inc., in violation of Contract Number 1950009J02, said monies and funds being the subject of United States Department of Labor Grant Number 37-9-0500-10, in violation of the provisions of Title 18, United States Code, Section 665.

FOURTH COUNT

That between on or about the 29th day of May, 1979 and on or about the 10th day of May, 1980, in the Eastern District of

North Carolina, WILBUR HOBBY, President of Precision Graphics, Inc., did willfully misapply and obtain by fraud monies and funds received under the United States Department of Labor Grant Number 37-9-0500-10, by using said monies and funds to purchase from Mohawk Data Sciences the equipment described in Overt Act 5, Count 1; said equipment being purchased in the name of and on behalf of Precision Data Institute, Inc., and such purchase being in violation of the provisions of North Carolina Department of Natural Resources and Community Development Contract Number 1950009J02, all in violation of the provisions of Title 18, United States Code, Section 665.

FIFTH COUNT

That between on or about the 21st day of May, 1979 and on or about the 10th day of October, 1979, in the Eastern District of North Carolina, WILBUR HOBBY, President

of Precision Graphics, Inc., did willfully misapply and obtain by fraud approximately \$3,000 of the monies and funds received under United States Department of Labor Grant Number 37-9-0500-10, by charging for and being reimbursed for rental of certain data processing equipment for the period of on or about May 21, 1979 through on or about June 15, 1979, when such data processing equipment was not in fact functionally operational until on or about June 15, 1979, in violation of the provisions of Title 18, United States Code, Section 665.

A TRUE BILL

Ayden R. Lee, Jr.
FOREMAN

James Blackburn
UNITED STATES ATTORNEY

JAMES M. O'REILLY
WAS CALLED AS A WITNESS, DULY SWORN, AND
TESTIFIED AS FOLLOWS:

DIRECT EXAMINATION

By Mr. Beskind:

Q. State your full name for the record, spelling your last name, please.

A. James M. O'Reilly, O--Capital "R" - E-I-L-L-Y.

Q. How old are you sir?

A. 39.

Q. What is your present employment?

A. I'm a statistical social science consultant.

Q. And your offices are where?

A. In Durham.

Q. Would you describe briefly to the court your background, in terms of education and employment before your 170 present position?

A. I have received a bachelors degree in economics from the University of Michigan in 1966; In 1967, I entered the Army; I was discharged from the army in late 1969; I became a newspaper reporter in 1970, worked as a reporter for three years, four years, in New Jersey and North Carolina; I entered graduate school at Duke University, received a masters in sociology and demography; and have completed all the work required for a Ph.D. in sociology that will be awarded in September.

Q. Would you tell us what newspaper you worked for in North Carolina?

A. The Durham Morning Herald.

Q. Have you previously qualified as an expert in statistics and demography in courts--in federal courts?

A. I have.

Q. And where would that be?

A. In the Eastern District of North

Carolina, the Southern District of West Virginia, the Northern District of Georgia, twice in the Southern District of Florida.

The Court: Do you recall when you testified in the Eastern District of North Carolina?

The Witness: I think it would be 1978, sir. It was in the case of USA versus Coates, et al.

By Mr. Beskind:

Q. And have you qualified as an expert
171 in statistics and demography in State Court in North Carolina?

A. I have.

Q. How many times would that be?

A. In excess of a dozen.

Q. Have you published anything in professional journals in the past in this area?

A. I've published two articles, one law review article and one chapter in a

book on discrimination.

Q. Is this a copy of the book in which you have written the chapter?

A. I've published two articles, one Law Review Article and one chapter in a book on discrimination.

Q. Is this a copy of the book in which you have written the chapter?

A. That's correct.

Q. Okay. Have you had special training-- Did you have special training in preparation for conducting Jury analysis?

A. The Graduate, Professional Studies of Demography suit, very nicely fit the problems of Jury representation.

Q. Would you explain what demography is?

A. Demography is the study of population and its components, mortality, fertility, mobility, migration, and the distribution of population and the items

that relate to that.

Q. Did you study statistics, also, in preparation of jury analysis?

A. Yes, I did.

172 Q. And computer analysis?

A. That's correct.

Q. And do you, in fact, own your own computer?

A. I do.

Q. Have you served as consultant to any State agencies in this area?

A. I have.

Q. And what would those agencies be?

A. The Governor's Crime Commission and the State Human Relations Council.

Q. And would you tell us briefly what you did for them?

A. I was approached by these agencies last fall as they became concerned about Jury representation in North Carolina and the possibility of taking steps to ameliorate any problems. They asked me

to consult with them. I did. I made recommendations on a better--a different approach. They accepted it. I drafted a piece of legislation, they accepted it. The Court's Commission accepted it. And essentially, it's just passed the Legislature, the change, the Jury source--the Jury sources in North Carolina, to a system that merges driver's licenses and voter registration roles.

Mr. Beskind: Your Honor, at this time we would offer Mr. O'Reilly as an
173 expert in Statistics and Demography.

The Court: The Court so finds.

By Mr. Beskind:

Q. Would you explain to the court what a jury study such as the one you've done in this case looks at?

A. The essential elements of a Jury study are to determine the make-up of the population, the cross-section, if the issue is whether a Jury is representative

a cross-section. And that's typically done using census information. And the second element is to determine the make-up of the Jury population that you're concerned with. And then the third step is to compare these two.

Q. So, it's fair to say that it's the comparison of the actual population in the community with the Jury Wheel, basically?

A. That's correct.

Q. In 1978, were you asked by the attorneys to study the Master Jury Wheel for the Eastern District of North Carolina?

A. I was.

Q. And is that the same wheel from which the jurors which indicted Mr. Hobby were selected?

A. That's my understanding.

Q. How did you go about doing your actual study?

A. The study was conducted-- data was

gathered from the District Clerk's office, 174 here, in Raleigh by two paralegals from the Atlanta lawyer's office, the Atlanta lawyer being Mr. Rupert Boulton.

And these two women, at my direction, following procedures I outlined for them and wrote down, pulled random samples from the--all the return questionnaires from the 1977 Wheel. They pulled samples in excess of 1100 people of exceptional--an extra large sample, because at that point, one of the issues was representation within divisions of the District, not Districtwide.

With that data, I had that data checked and keypunched. I analyzed the data.

Q. And did you also have data as to the population as to the Eastern District of North Carolina?

Q. And you did that work in 1978, is that correct?

A. That's correct.

Q. And with the 1970 data, is that right?

A. That's correct.

Q. Have you compared that '70' data to the preliminary 1980 data to see if there's any significant difference?

A. In the only way that it's possible. The only 1980 census information that's out so far is just on race of total population by counting the jurisdictions.

I compared that to the-- the calculations I made to estimate the 1976 racial make-up of the adult population of Eastern North Carolina with the information from the 1980 Census. And they are extremely close, within a percentage point.

Q. Would it make any difference in terms of anything you will be asked today?

A. None.

Q. Now, after you entered the data

into the computer, what did you do?

A. I wrote computer programs and prepared statistics and tables to illustrate or display the statistics on the population on the pool or the Master Wheel, and then statistics that expressed the differences between those two.

Q. Earlier this year I asked you to study the demographics of those who had served as grand jurors, here?

A. That's correct.

Q. And how did you do that?

A. I was given data from your office, from Mr. Leonard, with return questionnaires--the return questionnaires, essentially, of all the grand jury forepersons, and deputy forepersons for this jurisdiction since 1974.

Q. Now, was this a sample of those persons?

A. No it was not. It was the entire 176 count of all of the information that was

available for.

Q. For what years, sir?

A. '74' through '81', I think, sir.

Q. And how many foremen and deputy foremen did that cover?

A. Well, there were 15 Grand Juries, so there was 15 of each.

Q. Thank-you. Did you prepare a table that indicated the results of your study?

A. That's correct.

Q. Have you brought them with you?

A. I have.

Q. Do you have a copy?

A. I have.

Mr. Beskind: Your Honor, I would like these exhibits marked for identification.

The Court: Let them be marked.

Mr. Beskind: Your Honor, may I approach the witness?

The Court: Yes, you may.

By Mr. Beskind:

Q. Calling your attention to what has been marked as Defendant Hobby's Exhibit #1, would you tell the Court what it is please?

A. It's a table of statistics and the 177 results of the analysis of a demographic composition of the Master Jury Wheel for this period, 1977 to 1981.

Mr. Beskind: Your Honor, for the record, Exhibit #1 is Table 1, which was attached to the affidavit previously tendered to the Court.

By Mr. Beskind:

Q. Now, reading across the top, if we could look at the terms or the columns and consider just the first category that you've identified, which is race, would you explain what the term "observed" means?

A. Observed is the--refers to the persons in the sample that was pulled from

the Jury Wheel and therefore, the left-hand column under the observed is the number of whites and blacks found in the sample, and then the right-hand column represents the percent.

Q. Now, how many blacks and how many whites were in the sample of the Eastern District Master Grand Jury Wheel?

A. 873 whites, 219 blacks.

Q. And expressed in terms of percentages, what are the percentages of whites and blacks?

A. 80% white, 20% black.

Q. Now, the second column there is headed "expected", would you explain to the court what that means?

A. Expected, the number--the expected number is the number of whites and blacks 178 one would expect to find in a sample of that size if the jury wheel precisely represented the population found in the census. Therefore, it's essentially

taken by multiplying a total of the sample in which the case of whites and blacks is 1,092 times the percent of population, times 70% for whites and 30% for blacks. And so, we would expect to find, given that make-up of the population, 763 whites and 329 blacks.

Q. How many did you actually find?

A. We found 873 whites and 219 blacks. It was essentially 110 person difference.

Q. And so, your expected number of blacks was what number?

A. 329.

Q. And your actual number found?

A. 219.

Q. Now, in terms of percentage, what percent did--of whites would you have expected?

A. Would have expected 70% white.

Q. And what did you find?

A. 80%.

Q. And you would have expected what

percentage of blacks?

A. 30%.

Q. And what did you find?

179 A. 20%.

Q. Now, turning to the next column "Absolute Disparity," what does that mean?

A. Absolute Disparity is the simple difference between the percent expected and--the percent observed and the percent expected.

Q. Now, do you consider that in your work a useful indicator?

A. No, it's not in my opinion a useful indicator. It's certainly in many of the legal decisions, but it's not a helpful indicator to show the degree of over- or underrepresentation of a particular group.

A. Is there a more effective indicator in making that determination?

A. There is.

Q. And what's that called?

A. The Comparative Disparity.

Q. I believe that's your next column?

A. That's right.

Q. Would you indicate what the Comparative Disparity is and how it's arrived at?

A. The Comparative Disparity simply takes the absolute disparity and divides by the expected percent. Therefore, expresses the absolute disparity in terms of relative to the size of the population, and it tells relative chances of a member 180 of a particular group would have in being in a jury group.

So, in the example of the black, in Table 1, that minus 34% of the comparative disparity says that blacks in the Eastern District of North Carolina have--the average black has one-third less of a chance being a juror in the Eastern District of North Carolina than the

average white.

Q. And the average white?

A. Has 15% greater likelihood of being a juror than that person would have if the Juries reflected a cross-section.

Q. Now, the next column is called Pi Square. Would you tell the Court why that is there.?

A. Pi Square is a statistical bench mark used to calculate the probability of the observed difference or the differences found between the observed and the expected occurring by chance.

Q. So, I take it that if there was some other person checking your work would know the information with which you were working, is that correct?

A. That's correct.

Q. Now, I turn your attention to the columns marked "Probability and Odds" and ask if you would explain what those columns mean?

A. They're--first of all they're reciprocal. The odds are simply the flip
181 of the probability. You have--you have--
you divide the probability into one, you
get the odds.

Q. All right. When you say the odds are ten billion to one, ten billion to one as to what.

A. That says that the chances of finding the differences that we found between the observed and the expected, between the cross-section and the Jury Wheel, given the sample size that we pulled, the chances are ten billion to one, actually, greater than ten billion to one that that could have happened because of sampling variability, because of the normal fluctuations in sampling.

Q. All right, now, can it be expressed in terms of that's the probability that this could--you could get these results if, in fact, the wheel was a fair

cross-section?

A. That's another way of saying it.

Q. Now, I noticed that all of the odds here are ten billion to one. And yet other numbers seem to be different, can you explain that?

A. Yes, I calculated that using a program in a sophisticated hand calculator and it only displayed numbers up to ten digits.

Q. So basically ran off of a calculator?

A. That's correct.

The Court: Mr. Beskind, you're doing this for the court's benefit, I
182 assume, for me to rule on the motion.

Mr. Beskind: Yes, sir.

The Court: If you are, I suggest that you go into that a little deeper. I don't comprehend what he is talking about.

Mr. Beskind: I'm sorry, Your Honor.

I didn't hear you.

The Court: You may want to go into the ten billion to one odds a little more, if you're doing it for my benefit.

Mr. Beskind: I am doing it for your benefit, your Honor. I would be delighted.

By Mr. Beskind:

Q. Mr. O'Reilly, would you slowly go over the difference between probability and odds? And perhaps, you might want to use an analogy other than you used, other than statistician's language.

The Court: What odds are you talking about being ten billion to one?

The Witness: That if, in fact, the Master Jury Wheel was 30% black, 70% white, you know, the actual ten or twenty thousand names in that computer file, or however it's kept. If it actually was 30% black and one went in there and pulled a random sample of 1100 people out of that

Jury Wheel, the odds of finding in that sample is only 20% black are ten billion to one. I mean, it says the power of that 183 large of sample.

So, you know, if we took a sample of 300, in all likelihood, we would find that in our sample was roughly 20% black, 19, 21, 18, 22, ranging right around that. Yet our odds on that smaller sample might be ten thousand to one.

It refers to, you know, could you have gotten that difference because--you know, is there no real difference between the observed population and the master jury wheel, but the statistics we are showing are way off base because of sampling, the sampling area led to array. And this just says in that size sample it's extremely unlikely.

Q. Mr. O'Reilly, in terms of tossing a coin in heads or tails, could you explain what that means in terms of tossing a coin

ten times and having it come up heads eight times?

A. All right. That approach would--if you took a coin and tossed it, let's say 50 times and you found that you got heads 40 times, tails 10 times, you know, there's a possibility in normal flips that you are going to get an odd distribution like that, 40/10, even with an honest coin, even though it should be 25/25. But statistics can say in that example that the odds are--that that could have happened with an honest coin at say 10,000 to one. And so, that's this, with the sample of 1100.

The Court: The purpose of this is to show that the 1100 names that you drew in the sample is an accurate sample, isn't 184 that it?

A. That's right. That's right.

Mr. Beskind: Thank-you, Your Honor.

By Mr. Beskind:

Q. Do you have an opinion as to the extent in which blacks are under-represented on the present Eastern Jury--Eastern District Master Jury Wheel?

A. I do.

Q. And what is that opinion?

A. That they are very substantially underrepresented.

Q. By a factor of what?

A. By roughly a third.

Q. Now, turning to the next line and reading across on your table, would you explain to us how you draw the distinction between blue collar and white collar employment?

A. I categorize the occupations the jurors gave on their questionnaire form, 184 following strict census procedures on identifying, to categorize them into major occupational categories and then collapse them into what we understand to be white

collar and blue collar; clerical, managerial, professional making up white collar; operatives, laborers, craftsman, foreman making up blue collar.

Q. And did you use the same categories in making these decisions that the census bureau used in the census data?

185 A. Yes, I did. And I had to compare it with census information.

Q. All right. Without going through the data, do you have an opinion in which blue collar workers are underrepresented on the present Eastern District Master Jury Wheel.

A. I do.

Q. And what is it?

A. That they are very substantially underrepresented.

Q. And about or approximately what?

A. Roughly 50%. That is, there are about half as many blue collar workers as there would be if that Jury pool

represented the occupational structure of Eastern North Carolina.

Q. As to those with a high school diploma, is your next line, shows or less education, a high school diploma or less, do you have an opinion as to the extent in which the Eastern District Master Jury Wheel under represents those with a high school diploma or less?

A. I do.

Q. And what is that opinion?

A. That persons, less education persons, are substantially under-represented, to roughly to a degree of about a third. That is, that there is about a third fewer less than college educated in the jury wheel.

Q. And finally as to those people who are between the ages of 18 and 34, do you 186 have an opinion as to the extent to which that category of the population is under represented in the Master Jury Wheel of

the Eastern District of North Carolina.

A. I do.

Q. And what is that opinion?

A. That persons 18 to 34 years old are substantially underrepresented by roughly a third, again, or persons 18 to 34 years old in the jury wheel, than there would be if that wheel accurately represented the population.

Q. Now, do you have an opinion as to the cause of these people or groups being underrepresented?

A. I do.

Q. And what is that?

A. My opinion is that the sources used by the Court in creating the Jury Wheel. They have chosen sources that underrepresent these groups and they've gotten an unrepresentative Jury Wheel in Juries.

Q. What is the source that is used in the Eastern District of North Carolina?

A. Actual voters at the previous

presidential election. So, in this case, would be actual voters in the November 1976 election.

Q. Do you have an opinion as to what additional or replacement lists could be used that would make the Master Wheel more like a fair cross section of the
187 community?

A. I do.

Q. And what is that?

A. Well, things would improve, at least marginally, if the Court chose registered voters. Only roughly 40% of the eligible population actually vote. 60% registered and 60% of the registered voters, puts you down under 40%.

And but beyond registered voters, driver's license lists, particularly, and a merge system with drivers and voters, all the evidence shown gives much better representation of blacks, women and young people.

And presumably, though the data isn't there on education and occupation, that the effects would be similarly positive for the lower class.

Q. Do you have any reason to believe that the process, actual-- I'm sorry, a regular voter or registered voter and drivers (sic) were used would be any more complicated or any more expensive?

A. I'm pretty confident it would be simpler and less expensive than sending deputy court clerks out to individual jurisdictions to find out who voted. I mean, it's a very extra cumbersome way I think they've taken.

Q. All right. Turning your attention to what has been marked as defendant Hobby's Exhibit #2, would you tell the Court what that is, if you would.

A. This is a comparable analysis of a 188 group of persons who were picked as either forepersons or deputy foreperson for Grand

Juries in this district from 1974 to 1981.

Q. Looking at forepersons, only, not the combination of forepersons and deputies, that would be the second line down, would you tell the court at which the frequency with which women--I'm sorry--with which blacks served as forepersons on Grand Juries in the Eastern District between 1974 and 1981?

A. There were no black forepersons.

Q. And as to forepersons as to sex, would you tell the court the frequency at which women served as forepersons of a Grand Jury in the Eastern District of the United States between 1974 and 1981?

A. There were no women forepersons.

Q. Now, when you combine the job of foreperson and deputy forepersons, would you tell the Court the observed numbers with regard to race?

A. There were twenty-seven whites and

three blacks among the group of persons who were either foremen or deputy foremen.

Q. And what would you have expected using the census data?

A. Roughly 21 whites and 9 blacks. You would have expected about three times as many blacks.

Q. And that resulted in comparative 189 disparity in what percentage?

A. Minus 67%, or blacks were under-represented by two-thirds in these leadership roles in the Grand Jury system.

Q. And for just the foreperson as to race, what was the comparative disparity.

A. The comparative disparity was 100%. There were all--you know, it was just total exclusion.

Q. All right. Now, as to the sex as to the foreperson and the deputy foreperson, what did you observe in the

grand juries between 1974 and 1981 in the Eastern District?

A. There were 24 men and 6 women who served as either foreman or deputy foreman.

Q. And what would you have expected?

A. 15 of each.

Q. And the comparative disparity that that indicates?

A. That women are underrepresented by 60%, men overrepresented by 60%.

Q. What would be the comparative disparity for sex if you considered forepersons only?

A. 100%.

Q. I note that you don't have ten million to one over on the columns on the 190 right. Would you explain why that is?

A. Again that's because of the size sample here, and we're working with 30 people or 15 people, so that, if you had -- in the case of women, 15 chances to

choose--15 forepersons were drawn. So, there could have been any distribution of men and women. The likely distribution in a sex neutral process would be that there would be roughly half and half. The fact that it was 15 to zero, the statistics indicate that it could happen by chance, it would have happened only less than one time in 10,000.

Q. All right. Now, Mr. O'Reilly, in your profession as a statistician, what is the accepted odds at which these things are considered statistically significant?

A. 20 to one.

Q. And anything better than that is something on which a statistician can rely?

A. That any lower odds than 20 to 1, a statistician would say, well, we can't conclude that there's no difference, there's some conceivable chance that our differences found were the result of

sampling variations.

Q. But we're talking now about 20 to one or greater?

A. That's right.

Q. Because that's all that is here.

A. That's right.

Then the conclusion is, there's a real
191 difference and that we're not being led in
the wrong conclusions because we used the
sample.

Mr. Beskind: Your Honor, at this
time, the defendant Hobby offers into
evidences Exhibits #1 and #2.

The Court: Let them be examined.

CROSS EXAMINATION
9:59 A.M.

By Mr. Blackburn:

Q. Mr. O'Reilly, in making up your
charts, here, at what point, if any, did
you take into consideration the precise
manner in which the Eastern District of

North Carolina compiles its jury pool and specifically I'm asking the question within the divisions of the Eastern District?

A. I just need more specifics on the question. I don't know what you mean.

Q. In other words, do you know, sir, how the Eastern District decides to call, say 75 grand jurors for a Grand Jury session?

A. That I don't recall being investigated specifically, no.

Q. Do you know, sir, whether or not there are geographical divisions, represented within the Eastern District?

A. I do, sir.

Q. Do you know, sir, whether or not
192 your study took into account, for example, the Elizabeth City division or the Wilmington division or the New Bern division or the Fayetteville division?

A. Are we talking about the Master

Wheel analysis?

Q. No, sir, I'm talking--

A. --or the forepersons?

Q --Just with respect to whether or not your study ever considered how the grand jurors were actually summoned to a Grand Jury session.

A. No.

Q. Well, now, do you know, sir, how the Eastern District Court system actually summons people from, say, Wilmington to serve on a grand jury in Raleigh?

A. No, note (sic) I've heard--I don't know that professionally and I haven't studied that in detail. I just have extraneous information that I've heard.

Q. And I take it that would be your answer with respect to other divisions as well?

A. In terms as to how individuals are called for Grand Jury service, yes.

Q. Now, your study used the 1970

census, and I believe that in a response to a question from Mr. Beskind you said that you only used the 1980 census you were only able to compare racial make-ups, is that correct?

193 A. That's correct.

Q. Now, with respect, then to the 1976 election, which is the basis on which the Grand Jury which indicted Mr. Hobby was formed, do you know, sir, or do you have an opinion as to the relationship of the people who were in the Jury Wheel as a result of the 1976 election and of the actual population in 1976, the actual make-up of blue collar workers in 1976?

A. It's my conclusion that I do based on the 1970 census, yes.

Q. But based on any-- that material, of course, is six years by 1976?

A. That's correct.

Q. And you would agree, of course, that people are mobile in today's society,

is that true?

A. That's correct.

Q. So, is it correct for me to say-- strike that please.

Q. Do you have an opinion, sir-- well, strike that, too.

Q. Your opinion that it is the same is based on factual data that is six years old by 1976, is that correct?

A. My opinion that the 1970 data for occupation, education and age is the best data available to make a '76' comparison and in all likelihood, it's highly accurate.

194 And thirdly, that if there's any error, I have no way of knowing if the error would magnify the apparent under-representation, rather than diminish. In all those respects, I feel the '70' census is valid, useful, and there's no better data.

Q. I'm not quarreling with that. All

that I'm saying is, isn't it really a guess, though, that the make-up of the Jury Wheel of blue collar workers in 1976 is disproportionate to the population of blue collar workers in the Eastern District in 1976. Do you know--

A. No, it's not. In no conceivable way could I call that a guess. The actual proportion of white collar and blue collar in '76' could vary from what the census said in '70', but there's just no conceivable way, unless--that knowing what we do know about population change and the way it changes that the difference between '70' and '76' could be enough to at all change the conclusion that blue collar workers are very substantially under-represented. It could be less than we say, and it could be more.

Q. Have you conducted any studies with respect to the changes of our blue collar workers in the Eastern District between

'70' and '76'?

A. No, I have not.

Q. All right. With respect to the education category and the age category as well, I take it then that your analysis is 195 also based on information that is six years old by 1976, is that correct?

A. That's correct.

Q. With respect to foreman and deputy foreman, did you take into account that the position of sergeant of arms of the Grand Jury.?

A. I did not.

Q. Do you know, sir, what a foreman of a Grand Jury does?

A. I've heard.

Q. Do you know of your own personal knowledge? Have you ever served on a Grand Jury?

A. No, I have not.

Q. Do you know what a deputy foreman does?

A. What I know about it is hearing about a dozen Federal Judges in the Northern District of Georgia explain how it's done.

Q. Have you been present when a Grand Jury was selected?

A. No.

Q. Have you ever heard a District Court Judge instruct a Grand Jury on the responsibilities of a foreman or a deputy foreman or a sergeant at arms?

A. No, I have not.

Q. Do you know, sir, how many votes 196 each member of a grand jury gets?

A. I do.

Q. How many?

A. One each.

Q. Does a foreman or a deputy foreman get more votes than another grand juror?

A. No, I'm sure not.

Q. Now, you stated that it was your opinion that if you added people with

driver's license and also, what else?

A. Registered voters.

Q. People with driver's licenses and actual voters--registered voters--

A. Correct.

Q. --that you would get a greater cross section, is that correct?

A. Correct.

A. Is there anything in the North Carolina Plan, anything at all, which systematically excludes anybody from being placed in a Grand Jury Wheel, once that person has reached the age of 18 years?

A. I would say, yes. I mean, it's an argument on what systematically. I would say, given the history of North Carolina, the fact that most of the counties are under the Voter Rights Act and earn their participation in that program, the way history continues and works through that, 197 and ample social science and other studies

showing the characteristics of registered voters, the characteristics of actual voters, choosing-- if one knew that, and still chose actual voters, I would say, you know, that you'd have a very strong idea of what kind of result you're going to get. I'm not saying anybody did when they made that choice. But I'm saying that that's in one sense how systematic it is.

Q. Did you vote in 1976?

A. I did.

Q. Did anybody keep you from voting?

Mr. Beskind: Objection to Relevancy, Your Honor.

The Court: Overruled.

By Mr. Blackburn:

Q. Do you know anyone in Eastern North Carolina, right now that was systematically kept from voting in 1976? Anybody at all?

A. I've made no study of it.

Q. That's not the question.

A. I don't know. No, I don't know.

Q. Do you know how many blacks voted in 1976, with respect to the number of blacks in Eastern North Carolina?

A. Yes.

Q. How many?

A. These figure suggested about 20% of 198 the eligible blacks voted.

Q. Um hum.

A. These are samples-- The sample Jury Wheels are samples of the actual voter population. So, that's information on that.

Mr. Blackburn: Can I have just a moment, your Honor?

The Court: Yes. And while you are thinking, I'm going to ask a couple of questions myself.

EXAMINATION 10:09

By the Court:

Q. Mr. O'Reilly, the study and figure that you have accumulated and are testifying from today, do they differ in any respect, at all, from the figures that you gave in the Coates Trial?

A. The foreperson information is entirely new. The underlying data and the essential results of the studies of the Master Wheel are identical.

Q. You've conducted no additional study since that time, you've just interpolated additionally with regard to forepersons and deputy forepersons?

A. Yes, but the only other element that would be new is that it's a comparison of the 1980 information for the racial make-up. It validates the earlier number study of the population--certain

199 population.

Q. That doesn't change in any way--

A. No.

Q. It just confirms your feeling that

the figures were valid in 1976, just as they would have been in 1970, when they were taken?

A. Sure.

Q. Can you tell me, you have said that blacks, in your opinion, were underrepresented by approximately 30%. Can you give me a figure that you feel would be they would be underrepresented by use of voter registration, as opposed to voter participation?

A. It's a raw thing, but in general, looking at studies I've done in other North Carolina counties, approximately 16 or 18, the average black underrepresentation runs around 20%. Some I've worked on, 70, one time, or 50. But I would say 20 to 25%, rather than roughly 35% here.

So, that apparently would be a rough figure, going simply to registered voters.

Q. Can you tell me what these figures show as to the representation of blue collar workers, high school graduates and young people and how the use of voter registration as opposed to voter participation, what the figures would be?

A. I don't have figures on that. But my census gives me some other information. That it would enhance their representation. I don't think it would
200 wipe out the problem. You'd have to go to lists beyond the voter list to make really serious representation.

The Court: Any further questions?

Mr. Blackburn: Yes, sir.

Thank-you.

CROSS EXAMINATION
10:12 A.M.
(Resumed)

By Mr. Blackburn:

Q. Mr. O'Reilly, did you make any study, or obtain any information, for

example, as to how many blacks, blue collar workers, college or high school graduates, for the different age groups were on the actual Grand Jury that returned the indictment of Mr. Hobby?

A. No, I did not do that.

Q. You have, then, no opinion as to whether or not the membership of the Grand Jury that returned the indictment against Mr. Hobby and Mr. Levi and Hughes were in any way disproportionately represented, is that correct?

A. I didn't look at that because it's my understanding the law against statistics, essentially, is that you can't judge, basically, based on one Grand Jury. Now, this is not because you can't come to a conclusion about a matter. You don't look at it. As I say, you don't presume ill, but you don't presume good.

201 Q. Well, fair enough, but is the answer to the question, though, you really

did not make any study, then, of the grand jury make-up to determine that?

A. That's correct.

Q. And is it true, also that you have not made any study of any of the specific Grand Juries, themselves, not the Master Wheel, but the actual Grand Juries, of any that were in the Eastern District, say, since 1976?

A. No. Specifically, the Master Jury Wheel from which they are drawn is contaminated, if you draw randomly from that, you're going to get contaminated product.

Q. That is your opinion?

A. That's a simple fact of statistics.

Q. I understand that. That's your opinion.

The Court: Okay. Let me ask one last question, Your Honor.

By Mr. Blackburn:

Q. Strike that. That's all the questions.

The Court: Mr. Manning, do you desire to ask any questions?

Mr. Manning: No, your Honor.

202 The Court: Mr. Morgan?

Mr. Morgan: No, your Honor.

Mr. Beskind: Redirect, your Honor.

The Court: Proceed.

R E D I R E C T E X A M I N A T I O N
10:14 A.M.

By Mr. Beskind:

Q. Mr. O'Reilly, assuming that when the Eastern District Clerk draws a Grand Jury, draws 75 potential grand jurors, that those grand jurors are drawn in proportion to the population in each of the divisions in which they are drawn, would that make any difference as to any opinion that you have given here today?

A. Would you repeat the question?

Q. Sure. Assuming that when the clerk draws 75 names of potential grand jurors from which a Grand Jury like Mr. Hobby's will be drawn, that when he draws those 75 names he uses a mathematical formula to ensure that the grand jurors, the 75 drawn represent the proportional distribution of the population within the divisions of the Eastern District, would that make any difference as to the opinions that you have given here today?

A. No it wouldn't

Q. Secondly, when you used the 1970 data for your study here, did you make any
203 adjustments in that data in order to make it more accurate, considering the fact that it was being used in 1976?

A. The only adjustment made, the only adjustment possible, was to get at the 18 and older black/white population '76', I used the 12 year old and older in 1970. That is simply what we call aging the

population. And that's the only adjustment made.

The other element is, I didn't use the total population, I used the household population. That is, that household excludes persons living in Army Barracks, prisons, other institutional arrangements, who presumably are less likely to be eligible to vote and therefore to be eligible for jury service.

Q. So, rather than using '70' data for age and related things, for 18 year olds and above, you used it for 12 year olds and above, which would give you those people who would be 18 in 1976?

A. Right.

Q. Would you indicate what, with regard to the study of forepersons, is new, that is new in your testimony today?

A. The entire study, in the sense that there was no information that was gathered or analyzed about the composition of the

forepersons or deputy forepersons.

Q. Had none of that information been
204 presented in the Coates case?

A. That's right.

Mr. Beskind: Thank-you. No further
questions, Your Honor.

The Court: You may stand down.
Call your next witness.

(Witness excused).

The Court: Call your next witness.

Mr. Beskind: Your Honor, we have
no further witnesses.

Mr. Beskind: Your Honor, I must ask that you take judicial notice of the Jury Plan for this District as part of the record, and also, I believe that Mr. Blackburn is willing to stipulate that the forepersons are selected by the Judges who impanel the Grand Juries. And I would like to have that stipulation on the record as well.

The Court: Let the record so reflect.

The real question in the motions that are presented have to do with Sections 1861 or 1862 of Title 28 of the United States code.

1861 provides that all litigants are entitled to Trial by Jury and the right to have their Grand Jury selected by a fair cross-section of the community in the District or Division wherein Court is convened.

Section 1962 provides that no

citizen shall be excluded from service as a grand or petit juror in the District Courts of the United States on account of race, color, race, religion, sex, national origin, or economic status.

Now, the Fourth Circuit Court of Appeals, in the case referred to, United States of America v. Gilliam Wayne Coates, in an opinion by Circuit Judge Donald Russell, as acting on the very testimony you're relying on in this case, counsel, with the absence of the testimony concerning forepersons, and the possibility of blue collar versus white 212 collar workers.

But Judge Russell pointed out in his decision as defendant's own figures demonstrate the use of voter registration lists, rather than actual voter list would increase the source by percentages indicated. Yet both types of lists are expressly approved by the Act.

Now, of course, that's still true today. Title 28, Section 1863 specifically provides that voter registration, actual voter list and/or voter registration lists utilized by this district, is a matter of public record that since this case has arisen--well, maybe it was before the case arose, but the court is now in the process of putting together a new Jury Wheel, adopted under the same procedures, and using the same voter lists as before. In fact, the Raleigh Division is approximately completed now.

That plan has been approved by the Circuit Counsel of the Fourth Circuit by Statute as it must be. The provisions in the United States Code have not been changed or amended during this long period of time, and the court, based on the Coates Decision feels that the Defendants failed to prove any violation of the

quoted Section of the Statute.

Therefore, the Motions are denied.

Mr. Beskind: Your Honor, may we assume that your Ruling applies to forepersons as well as to the other challenge?

The Court: Yes, indeed. If I did not make it clear, I do now. The basis of the Motion was comprehensive, if you intended to do that. But my Ruling this morning is comprehensive.

The court does not feel that the addition of this element makes any difference in the Plan that has been entered into by this District, and the decision as entered by Judge Russell in the Fourth Circuit Court of Appeals.

Mr. Beskind: Thank-you, Your

214 Honor.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

No. 81-5-CR-5

No. 81-6-CR-5

UNITED STATES OF AMERICA)

v.)

WILBUR HOBBY, et al.)

MEMORANDUM

In accordance with the 1 July 1981 hearing in Raleigh, North Carolina, the following Motions were ruled upon by the Court:

1. Defendants' Motion to Dismiss the Indictments Due to Improper Selection of Grand Jurors -This Motion was denied by the Court.

2. Defendants' Motion to Dismiss the Indictments Due to Selective Prosecution -This Motion was denied by the Court.

3. Defendants' Motion to Suppress Evidence and Return Property was heard by the Court and taken under advisement.

4. The Motion of the United States to Quash Subpoenas for Testimony and Production of Documentary Evidence was determined by both parties to be moot.

This 10 July 1981.

W. EARL BRITT
United States District Judge,

GUILTY BY A JURY, AND A DETERANCE TO
OTHERS.

All right, Mr. Hobby, if you will stand, please.

Madam Clerk, as to Count I of the Bill of Indictment, it is adjudged that the Defendant is hereby committed to the custody of the Attorney General of the United States or his authorized representative, for imprisonment for a term of 18 months.

As to Count II--Count III--strike that. Continuing with Count I. And that he pay a fine in the amount of \$10,000.00.

Now, let me say at this point, Counsel for Defendant Hobby, that the court is going to impose the maximum fine on each count of this indictment. I remind you of the provisions of Rule 35, rules of criminal procedure, which for the benefit of the rest of you is a provision

whereby a sentence may be modified by the court. The reason the court is imposing the maximum fine is I have absolutely insufficient information on which to base a fine that the defendant could pay, or I have nothing to indicate that he could not pay that. If you can show me through proper financial statements something about the financial condition of the defendant, which should have been before me today, I will take that into consideration.

As to Count III of the Bill of Indictment, it is the judgment of the
796 Court that the Defendant is hereby committed to the custody of the Attorney General of the United States or his authorized representative for imprisonment for a term of two years. The execution of this sentence is hereby suspended and defendant is placed on probation for a period of five years. Such period of

probation shall be consecutive to the sentence imposed on Count I. Let that read, Madam Clerk, to the confinement portion of the sentence served on Count I, and is to be on the following terms and conditions: The Defendant is to remain of good behavior and is to provide community service not less than eight hours per week in some program approved by his probation officer, and that he pay a fine in the amount of \$10,000.00.

Count IV of the Bill of Indictment. The Defendant is hereby committed to the custody of the Attorney General of the United States or his authorized representative for imprisonment for a term of two years. The execution of this sentence is hereby suspended and Defendant is placed on probation for a period of five years. This sentence is to run concurrently with the sentence imposed in Count III, and is to have the same terms

and conditions. Defendant is to pay a fine in the amount of \$10,000.00 on Count IV.

1797

On Count V of the Bill of the Indictment, Defendant is hereby committed to the custody of the Attorney General of the United States or his authorized representative for imprisonment for a term of two years. Execution of this sentence is hereby suspended and Defendant is placed on probation for a period of five years under the same terms and conditions as set forth for Counts III and IV, this sentence to run concurrently with that imposed in Counts III and IV and pay a fine in the amount of \$10,000.00.

It is the Court's recommendation that the Defendant be imprisoned at the Lexington, Kentucky facility where his medical needs can be met and attended to, and if the Defendant desires, that he be allowed to report under the directions of

the United States Marshal Service and the Bureau of Prisons at a time to be designated at his own expense. Does he desire that provision?

Mr. Beskind: Your Honor, we would like that provision. We would also at an appropriate time like to take up the matter of a Bond for Appeal.

The Court: Yes, I will get into that, but, and I realize that this may be quite some time.

Mr. Beskind: We would like to avail ourselves to that provision, Your Honor.

The Court: Mr. Hobby, this sentence means that I am giving you what is known as a split sentence. I am giving you 18 months active and Madam Clerk, I want the record to reflect that it is the Court's intention and feeling that the Defendant
1798 should serve between 6 and 12 months of that sentence. Now, the reason that I am putting that in there is that the parole

guidelines provide that you must serve your minimum--a minimum of a third, but there is no way under any interpretation that I have available to me for me to be any more definitive than that. So I will put it in there for what it is worth. I hope the prison people and the Board of Paroles will take that into consideration, and that what this additionally means is that after you serve whatever time that is on that sentence, you will be on probation for a period of five years. I will advise you now that you have a Right of Appeal. The entry of it may be made within ten days after this Judgment. If you do not, cannot afford an attorney to perfect your Appeal, one will be appointed for you.

You may be seated.

Mr. Levi, stand please.

Madam Clerk, that all hands have been raised.

Mr. Sharp, as foreman of the Jury, you have reported the case of United States of America versus Wilbur Hobby as follows:

We the Jury find the Defendant Wilbur Hobby guilty as to Count I and guilty as to Count II--that's Count III, correction--guilty as to Count IV and guilty as to Count V; is that the Verdict of the Jury?

Foreman: It is.

The Court: Members of the Jury, so many of you as agree that your foreman has correctly reported your Verdict, please indicate by raising your right hand.

(All hands raised.)

The Court: Members of the Jury,
1795 quite obviously, this completes your task.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NO. 82-5143

United States
of America,

Appellee,

versus

Wilbur Hobby,

Appellant.

No. 82-5144

United States
of America,

Appellee,

versus

Mort Levi,

Appellant.

O R D E R

Upon consideration of the petition for rehearing, no request for a poll of the court being made on the suggestion for

rehearing en banc, and with the
concurrence of Judge Hall and Judge
Phillips,

IT IS ORDERED that the petition for
rehearing be, and it hereby is, denied.

Clement F. Haynsworth, Jr.
United States Circuit Judge

Supreme Court of the United States

No. 82-2140

Wilbur Hobby,

Petitioner,

v.

United States

ORDER ALLOWING CERTIORARI.

Filed December 12, 1983 .

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit is granted, limited to Question 3 presented by the petition.

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No. 82-2140

Office-Supreme Court, U.S.

FILED

NOV 9 1983

ALEXANDER L. STEVAS,

In the Supreme Court of the United States

OCTOBER TERM, 1983

WILBUR HOBBY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether the district court failed adequately to instruct the jury concerning the elements of a charge of defrauding the United States of CETA program funds.

2. Whether petitioner's claim of selective prosecution was sufficiently supported to require holding of an evidentiary hearing.

3. Whether alleged discrimination in the selection of grand jury forepersons resulting in the underrepresentation of women and blacks in that position provides a basis for reversal of a conviction upon an indictment returned by the grand jury.

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In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 82-2140

WILBUR HOBBY, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT*

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A19) is reported at 702 F.2d 466.

JURISDICTION

The judgment of the court of appeals was entered on March 9, 1983. A petition for rehearing was denied on April 29, 1983. The petition for a writ of certiorari was filed on June 29, 1983, one day out of time. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of North Carolina, petitioner and codefendant Mort Levi were convicted of conspiring to defraud the United States of monies appropriated under the Comprehensive Employment and Training Act of 1973 (CETA), 29 U.S.C. (& Supp. V) 801 *et seq.*, in violation of 18 U.S.C. 371 and 665 (Count

1). In addition, petitioner was convicted on three counts of fraudulently obtaining and misapplying CETA grant funds, in violation of 18 U.S.C. 665 (Counts 3, 4, and 5). Petitioner was sentenced to 18 months' imprisonment on Count 1; his sentence to concurrent terms of two years' imprisonment on Counts 3, 4 and 5 was suspended in favor of five years' probation. In addition, he was fined \$10,000 on each count. The court of appeals affirmed (Pet. App. A1-A19).

1. The evidence adduced at trial is summarized in the opinion of the court of appeals (Pet. App. A2-A8). The pertinent background is as follows: At the time of the events that led to this prosecution, in 1979, petitioner was the president of the North Carolina chapter of the AFL-CIO. Petitioner also owned Precision Graphics, Inc., a printing company located across the street from the labor organization's headquarters in Raleigh that sometimes performed work for the chapter. Prior to 1979, the labor organization had been using independent contractors to maintain its membership data in computerized form, but as early as 1977 petitioner had suggested to the chapter's board that the union should acquire its own computer capacity. Petitioner had also mentioned that there might be CETA funds available for projects the AFL-CIO was interested in (II C.A. App. 1199, 1201). Petitioner was well acquainted with the CETA program; he entered into 15 CETA contracts between 1977 and 1979.

In early 1979 petitioner's interest in the CETA program and his interest in acquiring a computer for AFL-CIO use began to converge. In January petitioner began discussions with a representative of Mohawk-Data Sciences, a firm that had provided equipment for other state AFL-CIO affiliates that was tailored to exchange data with the computers in AFL-CIO national headquarters, concerning acquisition of such a computer for the North Carolina chapter (I C.A. App. 427-431).

Meanwhile, petitioner and co-defendant Levi formed a new company, Precision Data, Inc., which promptly submitted to the North Carolina Department of Natural Resources and Community Development (DNRCD) an application for CETA funds to establish a data processing training program.

Precision Data's proposal was received with some skepticism by DNRCD staff members because officials doubted the need for such a program in the region to be served, and because Precision Data had no staff or plant, nor any experience in data processing training or in the CETA program generally and would be wholly funded by the proposed grant (II C.A. App. 655-657). Petitioner's funding proposal was modified in response to some of these concerns. Because it was a going enterprise with experience in administering CETA training, Precision Graphics was denominated the grantee in place of Precision Data. On May 21, 1979, DNRCD approved a grant of \$129,429 to Precision Graphics to operate the proposed data processing training program.

Earlier, in April, petitioner, acting on behalf of Precision Data, had agreed to purchase a computer from Mohawk-Data Sciences, for \$41,317.68. The contract prescribed a down payment of \$10,329.42, with the balance to be paid in 24-monthly installments. In addition Mohawk agreed to provide Precision Data with maintenance service for \$214/month.

On May 21, 1979, the very day that Precision Graphics' CETA application was approved, Precision Data and Precision Graphics entered an agreement for the latter to lease the computer just purchased by the former. A monthly rental of \$3,000 and a maintenance fee of \$125/week was agreed upon. As soon as the CETA contract between DNRCD and Precision Graphics was formalized, petitioner's co-defendant Levi secured an advance of \$43,696, and transferred \$18,000 of that amount to Precision Data, \$9,000 of which was des-

ignated for computer rental charges. Although the computer was not installed until June 15, 1979, on July 3 petitioner issued another check on Precision Graphics' data processing training program account, in the amount of \$5,000, to Precision Data for computer rental. In addition although Precision Data's obligation to pay Mohawk-Data for maintenance services (at the rate of \$214/month) did not accrue until July 16, 1979, Precision Graphics expended CETA grants funds under its maintenance agreement with Precision Graphics at the rate of \$125/week beginning May 21, 1979. The overcharges thus reaped by petitioner through Precision Data were the basis for the indictment.¹

2. The court of appeals affirmed the convictions of petitioner and his co-defendant. Petitioner had identified 14 issues on appeal, and his brief encompassed numerous additional issues under these headings. The court of appeals determined, however, that "[m]ost of these contentions are of little substance or frivolous" and accordingly limited its discussion to two points (Pet. App. A8). First, the court concluded that petitioner had suffered no prejudice from the district court's instructions that to convict petitioner for violation of 18 U.S.C. 665 the jury could find either fraud or diversion of funds. Although that charge is consistent with the statute, petitioner had claimed error arising from the district court's preliminary instruction, subsequently

¹ Petitioner's scheme began to unravel in August 1979, when DNRCD's Independent Monitoring Unit began to audit Precision Graphics' performance under its CETA contract. Based upon the results of the audit, the matter was referred for possible prosecution. The discrepancy between the rate of the monthly maintenance charge exacted by Precision Data and its own maintenance costs was the basis for Count 3 of the indictment. The discrepancy between the monthly computer rental charged and the cost to Precision Data of the equipment was the basis for Count 4. The rental charged for the period prior to installation of the computer was the basis for Count 5.

expressly corrected, indicating that the government was required to establish both fraud and diversion of funds. Acknowledging that due process concerns could be raised if the defense had been materially misled, the court of appeals noted that there was no indication that petitioner had relied to his detriment upon the incorrect preliminary instruction in framing his defense, that upon the record of this case the evidence of fraud and misapplication of funds was inseparable, and that there was no pertinent line of defense that might have been pursued that was not developed. Pet. App. A8-A13.

Second, the court of appeals upheld the denial of motions by petitioner and his co-defendant to dismiss the indictment based upon alleged statistical underrepresentation of blacks and women among federal grand jury forepersons in the Eastern District of North Carolina (Pet. App. A13-A19).² The court of appeals

² In the district court, the claims of petitioner, a white male, and his co-defendant Levi, a black male, rested both upon the allegedly non-representative composition of grand juries as a whole in the Eastern District of North Carolina, as reflected in a sample drawn from the master grand jury list, and the alleged underrepresentation of blacks and women in the position of foreperson. I C.A. App. 205-208. Although defendants' argument was not wholly explicit in this respect, their claim was stated alternatively in terms of "discrimination" (presumably in violation of the equal protection component of the Due Process Clause) and failure to reflect "a fair cross section of the community" (presumably in violation of 28 U.S.C. 1861). See I C.A. App. 205, 207. Defendants adduced statistical evidence for underrepresentation of blacks and women among grand jury forepersons, and on the list from which potential grand jurors were called (*id.* at 170-192). As to the former disparity, defendants argued that they had established a *prima facie* case that required the government to rebut an inference that the cause of the statistical disparity was discrimination by the judges of the United States District Court for the Eastern District of North Carolina in their supervision of the grand jury (*id.* at 207). The government did not present a rebuttal case but argued instead

recognized (Pet. App. A14-A15) that, in *Rose v. Mitchell*, 443 U.S. 545, 551-552 n.4 (1979), this Court had reserved the issue whether discrimination affecting only the selection of grand jury forepersons requires reversal of a conviction upon the resulting indictment. The court of appeals observed that, in contrast to the situation in *Rose*, federal grand jury forepersons are chosen from among the members of the grand jury itself, and their duties are purely ministerial and provide them with no special influence over the rest of the grand jury (Pet. App. A16-A17). Accordingly, although cognizant of the contrary decision of the Eleventh Circuit in *United States v. Perez-Hernandez*, 672 F.2d 1380 (1982), the court concluded that the "role [of a federal grand jury foreperson] is so little different from that of any other grand juror that the rights of defendants are adequately protected by assurance that the composition of the grand jury as a whole cannot be the product of discriminatory selection" (Pet. App. A18).

that defendants had not made out a prima facie case of intentional discrimination (*id.* at 210). Relying primarily upon *United States v. Coats*, 611 F.2d 37 (4th Cir. 1979), which upheld the jury selection plan of the Eastern District of North Carolina against a challenge based upon much of the same data adduced here (see I C.A. App. 171, 174-175, 199), the district court denied defendants' motion to dismiss the indictment (*id.* at 212-214).

On appeal, defendants' claim rested exclusively upon alleged underrepresentation of blacks and women among forepersons, and was predicated entirely upon an equal protection theory (Levi C.A. Br. 8-15; Hobby C.A. Br. 45). However, the argument that petitioner had standing to press the equal protection claim was supported by citation only of cases presenting Sixth Amendment fair cross-section claims (*Duren v. Missouri*, 439 U.S. 357 (1979); *Taylor v. Louisiana*, 419 U.S. 522 (1975)) or due process or statutory claims (*Peters v. Kiff*, 407 U.S. 493 (1972)) (Levi C.A. Br. 15).

ARGUMENT

Petitioner tenders three issues for review in this Court. The first two plainly are insubstantial and do not warrant further review.

The remaining issue, which concerns the identity of grand jury forepersons, may warrant this Court's attention. The decision of the court of appeals in this respect does not conflict with any decision of this Court and is supported by persuasive reasoning and strong policy considerations. Nevertheless, the court of appeals' decision does conflict with decisions of the Eleventh Circuit, and the conflict has become entrenched subsequent to the filing of the petition for a writ of certiorari. Although practical and legal considerations noted below might warrant denial of review at this time, we do not oppose further review here limited to this issue.

1. Petitioner claims (Pet. 17-19) that the court of appeals' decision "sanction[s] an indefensible sort of entrapment" (Pet. 18, quoting *Raley v. Ohio*, 360 U.S. 423, 425-426 (1959)). As we shall explain, however, no entrapment defense was raised by petitioner in the district court and no error on this score was alleged in the court of appeals. The court of appeals accordingly failed to address any such issue, and there is no occasion for review of any entrapment claim here.

The substance of petitioner's contention is that the district court erred in declining to adopt a proffered instruction to the effect that one who discloses to government agents "the material facts necessary for an understanding of a particular transaction" prior to obtaining payment in respect thereof from the government cannot be liable for fraud in connection therewith (see Pet. 18). But the requested instruction does not outline an entrapment defense. Petitioner does not suggest that he lacked a predisposition to commit the acts constituting the offenses charged, or that he was induced to

commit them by the advice of government agents. Petitioner's reliance on *Raley v. Ohio*, *supra*, and *Cox v. Louisiana*, 379 U.S. 559 (1965), is accordingly misplaced. See also *United States v. Russell*, 411 U.S. 423 (1973). Rather than raising an entrapment defense, petitioner's argument seems to be simply that he did not in fact deceive the government. But the jury was adequately instructed on this subject. The fraud element of the offense was defined as "an intentional perversion of truth for the purpose of inducing another, in reliance upon it, to part with something of * * * value" (III C.A. App. 1779). Accordingly, no question of general importance is raised by petitioner's contentions.

We note, as well, that petitioner raised no objection to this aspect of the instructions given, nor did he raise any specific objection to the district court's failure to give his proffered instruction, as required by Fed. R. Crim. P. 30. Moreover, in the court of appeals, petitioner did not assign as error the district court's failure to give the particular instruction that is the subject of his contention in this court.³ This default renders consideration of petitioner's claim for this Court inappropriate.

2. Petitioner contends (Pet. 19-24) that the district court improperly denied him an evidentiary hearing on his selective prosecution claim; he suggests (Pet. 25-32) that this case requires the Court to resolve a conflict among the circuits as to the standard for determining whether such a hearing is warranted. Assuming that the alleged "conflict" amounts to anything more than

³ Petitioner did complain in the court of appeals of the district court's failure to give other, similar, instructions and argued generally that the district court's instructions failed to alert the jury to his theory of the case (*Hobby C.A. Br. 14-15, 27-28*). Because that theory—to the extent it discloses a legally sufficient defense—was adequately conveyed by the instructions given, these contentions have no merit, and did not warrant discussion by the court of appeals. See page 4, *supra*.

semantic variation, which we doubt, no occasion for its resolution is presented.

Petitioner claims in this Court that his indictment was the first for CETA fraud in the Eastern District of North Carolina, and he observes that various irregularities in other North Carolina CETA contracts were investigated in the same general time period, but apparently did not lead to prosecution. Finally, petitioner's selective prosecution claim rests upon the assertion that he was a labor leader affiliated with one particular political party and known as an advocate of controversial positions on issues of public interest. Pet. 22-23. Petitioner's motion to dismiss the indictment was based entirely on these same allegations (I C.A. App. 231-242). The district court concluded that even assuming that respondent had made a colorable showing that others similarly situated had not been prosecuted, he had presented an insufficient basis for suspecting that the exercise of prosecutorial discretion was guided by political considerations or a desire to burden the exercise of respondent's First Amendment rights. The district court accordingly did not require the United States Attorney to testify concerning the decision to prosecute. The court of appeals affirmed without discussion of this point.

Given the court of appeals' failure to discuss this claim in its opinion, it can scarcely be claimed that the decision of the court of appeals creates a conflict respecting the *standard* for determining whether an evidentiary hearing is required. In any event, however the standard may be framed, no hearing was required in this case. The cases collected by petitioner themselves reveal that every circuit that has addressed the issue requires at least the allegation of some facts that, if proven, would give rise to reasonable doubt as to the permissibility of the considerations that underlie the prosecutor's decisions. Petitioner has not shown that

his factual allegations would be deemed sufficient to meet this test under the case-law of any circuit. Petitioner alleged only that he occupied a certain status—that of an outspoken labor leader with ties to a particular political party. He alleged no facts that suggest that the prosecutorial decision in his case was motivated by his identity. Plainly this cannot be a sufficient basis for casting upon the prosecutor the burden of explaining his decision to prosecute, for virtually any public figure subject to prosecution could claim that he was singled out because of some viewpoint he held that was antithetical to the views of the prosecutor.

The Court explained in *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978), that

so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.

Of course, when the decision to prosecute is based upon an impermissible criterion, such as race or religion or the exercise of constitutional rights, the general rule must yield to an exception. See *Oyler v. Boles*, 368 U.S. 448, 456 (1962). But here petitioner asks the Court to infer from a defendant's identity alone that his prosecution was improperly motivated. Where selective prosecution is alleged, as in cases of alleged vindictive prosecution, whether a presumption of impropriety is warranted must turn upon the likelihood that an impermissible factor will motivate the prosecutor in the particular type of situation involved. See *United States v. Goodwin*, 457 U.S. 368, 384 (1982). The facts alleged here pertaining to respondent's identity simply do not establish the "realistic likelihood" (*ibid.*; citation omitted) of improper motivation that would warrant the presumption sought.

3. Petitioner contends (Pet. 32-40) that historic underrepresentation of blacks and women among grand jury forepersons in the Eastern District of North Carolina provides a basis for setting aside his conviction unless the government establishes, through the testimony of the judges of the United States District Court for the Eastern District of North Carolina, that the observed statistical disparity does not reflect discrimination.⁴

a. Contrary to petitioner's contention (Pet. 33-34, 36-39), the decision of the court of appeals rejecting this claim is not inconsistent with *Rose v. Mitchell*. Rather, as the court of appeals noted (Pet. App. A14-A15), *Rose* expressly reserved the question. See 443 U.S. at 551-552 n.4. All of the language cited by petitioner in support of his assertion that *Rose* "held that racial discrimination in the selection of grand jury foremen was not and could not be harmless error" (Pet. 37; footnote omitted), was directed to an entirely distinct question—i.e., whether any defect in the composition of the grand jury should be deemed irrelevant because the defendant was subsequently convicted by a properly constituted petit jury. See 443 U.S. at 550-559. The question reserved by the Court (*id.* at 551-552 n.4) was whether "discrimination with regard to the selection of only the foreman" was to have the same consequences

⁴ We note that petitioner, a white male, now appears to base his claim at least partly upon a due process theory (see Pet. 32), as well as the equal protection component of the Due Process Clause (see Pet. 36-39, relying upon *Rose v. Mitchell*, which addresses an equal protection claim). Compare pages 5-6 note 2, *supra*. To the extent that petitioner raises an equal protection claim, he lacks standing. See *Alexander v. Louisiana*, 405 U.S. 625, 633 (1972); *United States v. Cronn*, 717 F.2d 164 (5th Cir. 1983); *United States v. Coletta*, 682 F.2d 820, 822-824 (9th Cir. 1982), cert. denied, No. 82-798 (Feb. 22, 1983). (A copy of our brief in opposition in *Coletta* has been provided to petitioner's counsel.)

as proven discrimination "taint[ing] the selection of the entire grand jury venire"—the issue presented here.

But *Rose* is not without bearing upon this case. As petitioner notes (Pet. 38), a fundamental premise of the Court's reasoning was that racial discrimination in the composition of a grand jury fundamentally "impairs the confidence of the public in the administration of justice" (443 U.S. at 556). But, for the reasons summarized by the court of appeals (Pet. App. A16-A18), racial discrimination affecting only the selection of a grand jury foreperson has no such effect. Unlike his counterparts under the laws of some states, the federal grand jury foreperson is selected from among the members of the grand jury itself, so any discrimination does not at all affect the overall composition of the grand jury. And the duties of the federal jury foreperson, unlike those of forepersons in some states, are essentially ministerial. See Fed. R. Crim. P. 6(c). Thus, any special duties carried out by forepersons do not suggest that they possess disproportionate influence over the deliberations of grand jury members. As the court of appeals concluded (Pet. App. A18), even if the foreperson exercises some marginal degree of informal influence over his or her peers, the role of the foreperson "is so little different from that of any other grand juror" that reversal of convictions and dismissal of indictments is not warranted.

Other substantial considerations support the decision of the court of appeals. First, because petitioner, who is not a member of the allegedly disfavored classes, has standing to raise only a due process claim (see page 11 note 4. *supra*), he must demonstrate that underrepresentation of blacks and women in the position of foreperson "cast[s] doubt upon the integrity of the whole judicial process" (*Peters v. Kiff*, 407 U.S. 493, 502 (1972) (opinion of Marshall, J.)). This high standard simply cannot be met in the present context. Second,

inasmuch as each grand jury has but a single foreperson, no inference of actual discriminatory selection sufficient to place the burden of refutation on the government (and the court) should arise from a general pattern of historic underrepresentation. Cf. *Taylor v. Louisiana*, 419 U.S. 522, 538 (1975) (limiting Sixth Amendment fair cross-section requirement to petit jury venires and emphasizing that actual jury panels need not conform to that standard). Because petitioner in no event has any cause for complaint unless *he* was indicted by a grand jury that is unconstitutionally constituted in this respect, the inference of discrimination that arises from statistical disparities in cases where an entire grand jury array is challenged lacks force here. See *Castaneda v. Partida*, 430 U.S. 482, 497 n.17 (1977) (noting role of large samples in statistical inference). Third, because of the severe disproportion between the wrong and the remedy, reversal of convictions and dismissal of indictments on the ground of discriminatory underrepresentation of members of a particular class among grand jury forepersons alone, where the grand jury itself is properly constituted, would tend to undermine rather than bolster the "confidence of the public in the administration of justice" (*Rose v. Mitchell*, 443 U.S. at 556).⁵ Finally, because the designation of forepersons, unlike selection of grand jury members, ordinarily rests in the hands of the judges of district court, preparation of a rebuttal case where discrimination is alleged based upon statistical inference necessarily would impose a substantial burden

⁵ The fact that petitioner was convicted by a validly constituted petit jury *combined with* his indictment by a validly constituted grand jury should suffice to render irrelevant any defect in the selection of a grand jury foreperson. Compare *Rose v. Mitchell*, 443 U.S. at 574-579 (Stewart, J. concurring), with *id.* at 551-559.

upon the judiciary. See *United States v. Cross*, 708 F.2d 631, 638-639 (11th Cir. 1983).

b. Petitioner also claims (Pet. 34-35) that the decision below conflicts with decisions of the Fifth and Eleventh Circuits. The claimed conflict with *Guice v. Fortenberry*, 661 F.2d 496, 498 (5th Cir. 1981), is insubstantial, for the decision there addressed the role of the grand jury foreperson under Louisiana law. On the other hand, as petitioner asserts and as the court of appeals recognized (Pet. App. A15, A18), the decision below is contrary to reasoning of the Eleventh Circuit in *United States v. Perez-Hernandez*, 672 F.2d 1380 (1982). In addition to *Perez-Hernandez*, the decision in this case is contrary to the reasoning of the Eleventh Circuit's opinion in *United States v. Holman*, 680 F.2d 1340 (1982), and the holding of that court in *United States v. Cross*, 708 F.2d 631 (1983). On the other hand, the position of the court below is supported by *United States v. Aimone*, 715 F.2d 822, 826-827 (3d Cir. 1983), petitions for cert. pending *sub nom. United States v. Dentico*, and *United States v. Musto*, Nos. 83-681 and 83-690 (filed Oct. 24 and 26, 1983, respectively)⁶ and *United States v. Coletta*, 682 F.2d 820, 824 (9th Cir. 1982), cert. denied, No. 82-798 (Feb. 22, 1983) (rejecting due process claim).⁷ Thus the question

⁶ *Aimone* is not necessarily irreconcilable with *Cross*, for the Third Circuit suggested that the disparate results reached "may be attributable to custom and practice that have developed in the respective districts" (715 F.2d at 827). But the Third Circuit also appears to have rejected the Eleventh Circuit's broader premise. *Ibid.*

⁷ At the time the petition was filed in this case, the Eleventh Circuit was internally divided on this issue. In *Perez-Hernandez* two judges concluded that discrimination in foreperson selection would require reversal (672 F.2d at 1386). Judge Morgan disagreed (*id.* at 1388-1389). But because all members of the court agreed that the government had successfully rebutted the inference of discrimination and that the conviction accordingly

presented in this case is the subject of a relatively entrenched conflict among the circuits that would, all other things being equal, warrant review by this Court.⁸

should be affirmed, there was no opportunity for the United States to seek en banc review. Then, in *United States v. Holman*, 680 F.2d 1340, 1356 n.12 (1982), a different panel of the Eleventh Circuit deemed itself bound by *Perez-Hernandez* but stated its approval of Judge Morgan's view that underrepresentation of a particular class of persons among grand jury forepersons is in no event a basis for setting aside a conviction or indictment. Because the court again concluded that the government had successfully rebutted the inference of discrimination and affirmed the conviction on that ground, the Eleventh Circuit once again had no opportunity authoritatively to resolve the issue.

Subsequent to the filing of the petition in this case, yet another panel of the Eleventh Circuit concluded that discrimination in foreperson selection provides a basis for challenging an indictment. *United States v. Cross*, *supra*. Because the district court had concluded otherwise, no evidentiary hearing had been held on the issue, and the court of appeals accordingly remanded for further proceedings. The government filed a petition for rehearing in *Cross*, suggesting en banc reconsideration in light of the evident intra-circuit and inter-circuit conflict. The court of appeals denied the government's petition for rehearing, even though the active members of that court who sat on *Perez-Hendandez*, *Holman*, and *Cross* are, according to their opinions in those cases, evenly divided, 4-4, on the issue presented.

* The appropriateness of further review may also be suggested by the divergent decisions of the courts of appeals on the subsidiary issue of the standing of persons not part of a disfavored class to complain of discrimination. As explained in our Brief in Opposition in *United States v. Coletta*, (pages 8-10; see page 11 note 4, *supra*), the Eleventh Circuit has extended standing to such persons without observing any distinction between due process and equal protection claims, whereas the Ninth Circuit has held that such persons have standing to complain only on due process grounds. Most recently, in *United States v. Cronn*, *supra*, the Fifth Circuit held that such persons had no standing to raise an equal protection claim, and declined to decide whether a due process claim could be maintained.

c. Practical considerations nonetheless give cause for hesitation as to the necessity of further review at this time. While a conflict among the circuits is apparent, there is good reason to believe that its practical importance is diminishing. As the court of appeals noted (Pet. App. A14 n.6), subsequent to the return of the indictment in this case, blacks and women have been represented among grand jury forepersons in the Eastern District of North Carolina. Moreover, the filing of motions to dismiss indictments such as the one in the present case, and the attention the resulting litigation focuses upon the need for appropriate foreperson selection methods, coupled with increased sensitivity throughout the legal system toward the importance of race- and sex-blind justice generally, is likely to eradicate any improper practices that may formerly have prevailed in this area.

Substantial confirmation for that viewpoint is provided by a survey of United States Attorneys conducted by the Department of Justice subsequent to the denial of our petition for rehearing in *Cross* (see page 15 note 7, *supra*). The responses to our inquiries disclose a striking pattern in those districts where there may have been a historical pattern of underrepresentation of women or minorities among forepersons. In district after district we were advised that in the past few years selection practices of the district court had been altered to eliminate problems that may have existed in the past.⁹

While these decisions are reconcilable, as we explained in *Coletta*, they reflect the recurring nature of the foreperson discrimination issue.

⁹ Irrespective of the ultimate disposition of this case, it is the intention of the Department of Justice to take steps to ensure that the United States Attorneys call the attention of the courts in their respective districts to the importance of nondiscriminatory foreperson selection procedures. We have already begun

On the other hand, we are confronted with the Eleventh Circuit's refusal to reconsider the rule it has adopted, and the resulting substantial burden imposed upon prosecutors and the district courts within that circuit. Moreover, if a demonstration of *past* statistical underrepresentation alone is sufficient to put the burden on the court to justify selection practices, this burden will be imposed notwithstanding the reforms we have described above. In view of those reforms, any arguable justification for allowing defendants to enforce by proxy the rights of persons who may have been improperly disfavored as respects the opportunity to serve as a grand jury foreperson (see *Rose v. Mitchell*, 443 U.S. at 558) is rapidly disappearing. Because the Eleventh Circuit rule is an open invitation to every defendant (regardless of race or sex) who is indicted by a grand jury with a white male foreperson outside the Third, Fourth and Ninth Circuits, to require the court to account for any past underrepresentation of women or minorities among grand jury forepersons, we believe, on balance, that a prompt resolution of the underlying issue is warranted.¹⁰

that process in connection with the survey described in the text. Similar action could be taken through the auspices of the Judicial Conference, the Administrative Office of the U.S. Courts and the Federal Judicial Center. We have called the attention of the staff of the Administrative Office and the Federal Judicial Center to the foreperson selection issue.

¹⁰ Even so, this case is not necessarily an ideal vehicle for that purpose. The precise nature of petitioner's claim is not entirely clear and has apparently changed in the course of litigation. Compare pages 5-6 note 2, *supra*, with page 11 note 4, *supra*. To the extent that petitioner relies on an equal protection theory he—like any white male defendant—is also confronted by a standing requirement which constitutes an alternative basis for affirmance. See page 11 note 4, *supra*. We note, as well, that the record of this case appears to contain no evidence as to any duties carried out by federal grand jury forepersons in the Eastern District of North Carolina apart

CONCLUSION

The petition for a writ of certiorari should be denied as to questions 1 and 2 presented. We do not oppose granting of the petition limited to the third question presented.

Respectfully submitted.

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NOVEMBER 1983

from the meager role outlined by Fed. R. Crim. P. 6(c). See page 14 note 6, *supra*. Finally, we note that the petition appears to have been filed one day out of time. See page 1, *supra*. Because petitioner's claim does not relate to the process by which his guilt was determined, the Court may prefer to reach this issue in a case presenting no time problem. We anticipate filing a petition for a writ of certiorari in *United States v. Cross*, *supra*; petitions are presently pending in Nos. 83-681 and 83-690 to review the Third Circuit's decision in *Aimone*.

No. 82-2140

Office - Supreme Court, U.S.

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In The
SUPREME COURT OF THE UNITED STATES
October Term, 1983

WILBUR HOBBY, PETITIONER

v.

UNITED STATES OF AMERICA

On Petition for Writ of
Certiorari to the United
States Court of Appeals for
the Fourth Circuit

REPLY BRIEF FOR PETITIONER

and

SUGGESTION TO DEFER CONSIDERATION OF
PETITION

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Other Authorities

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PETITION

The Government does "not oppose
granting of the petition limited to the
third question presented". Brief for
the United States, p. 18. The

Government acknowledges that the third question -- whether the courts below erred in condoning the systematic exclusion of Blacks from appointment as foremen of federal grand juries--" is the subject of a relatively entrenched conflict among the circuits that would, all other things being equal, warrant review by this Court". Brief for the United States, p. 15. However, the Government's remark (Brief, p. 17 n. 10) that "this case is not necessarily an ideal vehicle" for resolving this conceded conflict, merits this reply.

1. The Government is in error in its assertion that the petition for a writ of certiorari "was filed", or "appears to have been filed", one day out of time. Brief for the United States, pp. 1, 18 at n. 10. The Government apparently is unaware of the

circumstances of the filing, which was accomplished in timely fashion in accordance with Rule 33.7.

The due date for filing the petition was June 28, 1983, the 60th day after entry of the judgment of the Fourth Circuit. On that day, petitioner submitted to the Clerk of this Court 40 copies of the petition. But the Clerk refused to accept the copies for filing because the paper exceeded the size prescribed by Rule 33.1(d). The Clerk immediately returned the documents to petitioner, indicating the rule violation and suggesting that the documents be refiled in proper form as promptly as possible. Petitioner did in fact refile 40 copies of the petition in proper form the following day, June 29.

Rule 33.7 provides that when the Clerk refuses to accept a document as

not in compliance with this Rule, such as the page-size requirement of Rule 33.1(d), "the filing, however, shall not thereby be deemed untimely provided new and proper copies are promptly substituted". It also appears to be the practice of the Clerk's Office, in Rule 33.7 situations, to stamp and record as the filing date of the petition the date of the substituted filing (in this case, June 29), rather than the date of the attempt to file in improper form (in this case, June 28).

Thus the petition must be deemed timely filed, pursuant to Rule 33.7. Indeed, that has long been the practice in this Court where a timely filing is rejected by the Clerk because of non-compliance with a Rule respecting the form of the document. See R. Stern and E. Gressman, Supreme Court Practice

452 (5th ed. 1978), commenting on the provision in predecessor Rule 39(4) that is identical with the timeliness provision of present Rule 33.7.

2. The Government further suggests this case is not an "ideal vehicle" for resolving the conceded conflict because of a possible "standing" problem. Brief for the United States, pp. 1 at n. 4, 17 at n. 10. But there is no standing problem.

This is a federal criminal case. Petitioner is a white male. Levi, his co-defendant and alleged co-conspirator, is a black male. As this Court noted in Peters v. Kiff, 407 U.S. 493 at 501, n.

9:

"The principle of the representative jury was first articulated by this Court as a requirement of equal protection, in cases vindicating the right of a Negro defendant to challenge the

and

systematic exclusion of Negroes from his grand[↓] petit juries. E.g., Smith v. Texas, 311 U.S. 128, 130 (1940). Subsequently, in the exercise of its supervisory power over federal courts, this Court extended the principle, to permit any defendant to challenge the arbitrary exclusion from jury service of his own or any other class. E.g., Glasser v. United States, 315 U.S. 60, 83-87 (1942); Thiel v. Southern Pacific Co., 328 U.S. 217, 220 (1946); Ballard v. United States, 329 U.S. 186 (1946). Finally it emerged as an aspect of the constitutional right to jury trial in William v. Florida, 399 U.S. 78, 100 (1970)" (emphasis supplied).

3. Petitioner suggests that this Court defer action on the Petition for Certiorari pending consideration of the petitions in Cross and Aimone.

The Government anticipates "filing a petition for a writ of certiorari in United States v. Cross" (wherein the Court of Appeals for the Eleventh Circuit expressly disagreed with the decision below), and notes that

"petitions are presently pending in Nos. 83-681 to review the Third Circuit's decision in Aimone" (wherein the Third Circuit expressly agreed with the decision below). Brief for the United States, p. 18, at n. 10. The Government therefore suggests that "the Court may prefer to reach this issue in a case presenting no time problem". Brief for the United States, p. 18, at n. 10. The implication is that the Court should deny certiorari here, and later review the issue on the Government's petition in Cross, ^{and} on the pending petitions in Aimone.

To this suggestion Petitioner makes two answers. First, as demonstrated above Petitioner has no "time problem". Second, it makes no sense to deny certiorari here (with the consequence that petitioner Hobby go to jail for 18

months) and decide the issue on a truncated record. Petitioner suggests that the records¹ in his case, like the records in the Cross and Aimone cases, will enhance the knowledge available for consideration, provide additional insights, and thereby assist the Court in its decision processes.

4. Petitioner disclosed a serious conflict in the circuits concerning the amount of preliminary proof necessary to trigger discovery and a hearing on the issue of selective prosecution. Petition, pp. 25-32.

In this case, the lower courts were in agreement with the standard of the Eighth Circuit, that the defendant must establish a prima facie case to warrant a hearing on the issue of selective prosecution. Petition, p. 29. Similarly, the Fifth and Sixth Circuits

view the defense with "extreme skepticism", on a "separation of powers" theory which precludes judicial interference "with the free exercise of the discretionary powers" of the district attorney absent a strong showing of "bad faith" and "impermissible considerations".
Petition, pp. 27-28.

In contrast, the First Circuit has expressly rejected the prima facie test and requires only that the defendant allege facts "tending to show" that there has been selective prosecution. In accord are the triggering requirements of the Second Circuit (a "colorable basis"), the Third Circuit (a "colorable entitlement"), and the District of Columbia Circuit ("colorable claim".) Petition, pp. 26-31. The Seventh Circuit, en banc, with one

concurrence and four dissents, similarly requires only that the defendant "raise a reasonable doubt about the prosecutor's purpose". Petition, p. 29.

The Government dismisses the difference in the circuits as a "semantic variation". Brief for the United States, pp. 8-9. Petitioner submits that it is a matter of substance which requires this Court's direction and guidance.

Respectfully submitted

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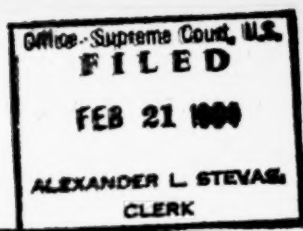
November 22, 1983

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of November, 1983, three copies of the Reply Brief for Petitioner and Suggestion To Defer Consideration of Petition in Hobby v. United States, No. 82-2140, were mailed postage prepaid to the Solicitor General of the United States at the Department of Justice, Washington, D. C. 20530.

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No. 82-2140

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QUESTION PRESENTED

The Court has limited the grant of certiorari to the following question:

"Whether the courts below erred in condoning the systematic exclusion of Blacks from appointment as foremen of federal grand juries."

fn. The parties to this litigation are set forth in the caption. Mr. Mort Levi was indicted, tried and convicted with Hobby as a co-conspirator. He did not petition for review from the affirmance by the COURT OF APPEALS

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Crosbie, Paul V., <u>Interaction In Small Groups</u>	42
S. Dash, <u>The Indicting Grand Jury; A Critical Stage, 10 American Criminal L. Rev. 807 (1972) ...</u>	89

Davis, C. and C. Rowland, <u>Assessing The Consequences of Ethnic, Sexual, and Economic Representation on State Grand Juries: A Research Note</u> , 5 The Justice System Journal 197 (published by the Institute of Court Management, Denver, Colorado, Winter, 1979)	93
Emerson, D., <u>Grand Jury Reform: A Review of Key Issues</u> , a publication of the National Institute of Justice of the U.S. Department of Justice	89
Frankel, M. and G. Naftalis, <u>The Grand Jury, An Institution On Trial</u>	79,82,90
<u>Grand Jury Reform</u> , Report by the Committee on Federal Legislation and the Committee on Civil Rights of the Association of The Bar of the City of New York	87,90
<u>Handbook For Federal Grand Jurors and Model Charge</u>	15,20,23,24,25 26,27,28,44,88
Hare, A. Paul. <u>Handbook of Small Group Research</u>	40
Hopkins, Terence K. <u>The Exercise of Influence in Small Groups</u> ...	42
Nixon, H. L., <u>The Small Group</u>	42
Padover, S. <u>The Complete Jefferson</u>	86

Schwartz, H., <u>Demythologizing The Historic Role of the Grand Jury</u> , 10 American Criminal Law Review 701 (1972)	80,81,91
Strodtbeck, F., James, R. and Hawkins, C., <u>Social Status In Jury Deliberations</u>	42
Van Dyke, J., <u>The Grand Jury: Representative or Elite?</u> , 28 Hasting L. Rev. 37 (1976)	80,83,90,91
Zeisel, H. <u>The American Jury</u>	39,40

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

WILBUR HOBBY,

PETITIONER,

v.

UNITED STATES,

RESPONDENT

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
FOURTH CIRCUIT

BRIEF FOR PETITIONER

OPINIONS BELOW

The decision of the Court of Appeals
is reported at 702 F.2d 466, and is set
out in the appendix to the Petition for
Writ of Certiorari (hereinafter cited as
"P.A."). The order denying rehearing,

which is not reported, is set out in the Joint Appendix at p. 123 (hereinafter cited as "J.A."). The motion to dismiss the indictment due to improper selection of grand jury is set out in J.A. p. 32; and the order of the District Court denying the motion is set out at J.A. 113-114.

JURISDICTION

Petitioner Hobby was indicted in the United States District Court for the Eastern District of North Carolina on February 10, 1981.

The judgment of the Court of Appeals was entered on March 9, 1983. A timely Petition for Rehearing and suggestion for rehearing en banc was denied on April 29, 1983. The Petition for a Writ of Certiorari was filed on June 28, 1983, and was granted on December 12, limited to the third question. This Court has jurisdiction under 28 USC § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND
RULES INVOLVED IN THIS CASE

The Fifth Amendment to the Constitution
provides in pertinent part that:

"No person shall be held to
answer for a capital or otherwise
infamous crime, unless upon
presentment or indictment of a
Grand Jury ... nor be deprived of
life, liberty, or property,
without due process of law"

The Sixth Amendment to the Constitution
provides in pertinent part that:

"In all criminal prosecutions
the accused shall enjoy the right
to a speedy and public trial, by
an impartial jury of the state
and district wherein the crime
shall have been committed...."

Title 18 USC § 243 provides that:

"No citizen possessing all
other qualifications which are or
may be prescribed by law shall be
disqualified for service as grand
or petit juror in any court of
the United States, or of any
state on account of race, color,
or previous condition of
servitude; and whoever, being an
officer or other person charged
with any duty in the selection of
summoning of jurors, excludes or
fails to summon any citizen for
such cause, shall be fined not
more than \$5,000."

The Jury System Improvements Act of 1978

provides in relevant part as follows:

28 USC § 1861.

It is the policy of the United States that all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes. It is further the policy of the United States that all citizens shall have the opportunity to be considered for service on grand and petit juries in the district courts of the United States, and shall have an obligation to serve as jurors when summoned for that purpose.

28 USC § 1862

Discrimination prohibited

No citizen shall be excluded from service as a grand or petit juror in the district courts of the United States or in the Court of International Trade on account of race, color, religion, sex, national origin, or economic status.

Rule 6 of the Federal Rules of Criminal Procedure provides in pertinent part as follows:

(a) Summoning Grand Juries. The court shall order one or more grand juries to be summoned at such times as the public interest requires. The grand jury shall consist of not less than 16 nor more than 23 members. The court shall direct that a sufficient number of legally qualified persons be summoned to meet this requirement.

(c) Foreman and Deputy Foreman. The court shall appoint one of the jurors to be foreman and another to be deputy foreman. The foreman shall have the power to administer oaths and affirmations and shall sign all indictments. He or another juror designated by him shall keep a record of the number of jurors concurring in the finding of every indictment and shall file the record with the clerk of the court, but the record shall not be made public except on order of the court. During the absence of the foreman, the deputy foreman shall act as foreman.

(f) Finding and Return of Indictment. An indictment may be found only upon the concurrence of 12 or more jurors. The indictment shall be returned by the grand jury to a judge in open court. If the defendant is in custody or has given bail and 12 jurors do not concur in finding an indictment,

the foreman shall so report to the court in writing forthwith.

STATEMENT OF THE CASE

Wilbur Hobby was the long-time President of the North Carolina AFL-CIO, and as such was a frequent participant in the various state sponsored programs to train the unemployed for useful employment. Prior to the events here in issue, he had signed some 15 contracts with the state of North Carolina, its departments and agencies under the Comprehensive Employment and Training Act of 1973, commonly known as CETA. Mort Levi, a Black, was employed by the North Carolina AFL-CIO to prepare CETA proposals, and operate the programs on a day to day basis.

Wilbur Hobby and Mort Levi were indicted as co-conspirators in connection with a CETA contract to train 40 unemployed and unskilled young men and

women as computer operators. The contract was in the name of Precision Graphics, a printing company owned by Wilbur Hobby. It authorized payment of \$130,833. The contract was fully performed. The students were trained, and almost all obtained employment with their new skills. Precision Graphics billed the state only \$88,786 (some \$42,047 less than the contract price) for its services. Nonetheless, Wilbur Hobby and Mort Levi were indicted by a federal grand jury for fraud in connection with this contract in the amount of approximately \$15,000.

Prior to the trial, petitioner moved to dismiss the indictment due to improper selection of grand jurors (J.A. 32). The motion was based on the Fifth and Sixth Amendments to the Constitution, The Jury System Improvements Act of 1978, and Rule 6 of the Federal Rules of Criminal Procedure. (J.A. 32).

A hearing was held on this motion, and the principal witness was James M. O'Reilly, a statistical social science consultant. (J.A. 58) Mr. O'Reilly had compared the general population of the eastern District of North Carolina with the jury population--the "actual population in the community with the Jury Wheel." (J.A. 63-64).

Mr. O'Reilly testified that Blacks were substantially underrepresented on the Jury Wheel (J.A. 70-71, 80); that blue collar workers are "very substantially underrepresented" (J.A. 81); that those without a high school diploma "are substantially underrepresented" (J.A. 82); and that persons "18 to 34 years old are substantially underrepresented." (J.A. 83).

This underrepresentation was due to the fact that those on the "Jury Wheel" were selected from those who actually voted in

the previous presidential election. (J.A. 83-84).

Mr. O'Reilly then testified concerning "a comparable analysis of a group of persons who were picked as either forepersons or deputy forepersons for Grand Juries in this district from 1974 to 1981." (J.A. 85-86). During this period there were fifteen Grand Juries. (J.A. 68).

Between 1974 and 1981 "There were no black forepersons." (J.A. 86) There were "no women forepersons." (J.A. 86) When the jobs of "foreperson and deputy forepersons" were combined, there was a total of "twenty-seven whites and three blacks" among the group of persons who were either foremen or deputy foremen. (J.A. 86-87). Using the census data, O'Reilly would have expected "roughly 21 whites and 9 blacks. You would have expected about three times as many

blacks." (J.A. 87).

The Court asked Mr. O'Reilly if his testimony differed in any way from his testimony in United States v. Coates. Mr. O'Reilly replied that "the foreperson information is entirely new." (J.A. 101).

On redirect examination Mr. O'Reilly emphasized his study of forepersons was entirely new, that "none of that information had been presented in the Coates case." (J.A. 108, 109).

The District Court denied the motion to dismiss the indictment because of the Coates decision. (J.A. 111) He pointed out that the Fourth Circuit "acting on the very testimony you're relying on in this case, counsel, with the absence of the testimony concerning forepersons" sustained the jury plan based on "actual voters" (J.A. 111). The District Court concluded that the addition of the

"forepersons" element makes no difference.
(J.A. 113).

Hobby and Levi appealed, and their appeals were consolidated. The Court, below, per Senior Circuit Judge Haynesworth, recited that each had "sought dismissal of the indictment on the basis of alleged discrimination in the selection of grand jury foreman in the Eastern District of North Carolina." 704 F2d 466 at 470, P.A. 13-14. The Court below did not dispute the evidence that "in the years 1974-1981 no Black had served as foreman of the grand jury in that district, and no woman." 702 F2d at 470, T.A. 13-14. The Court simply held that racial (and sexual) discrimination by federal judges in the appointment of grand jury forepersons is immaterial as a matter of law. The Court concluded its discussion on this point as follows:

The foreman of a federal grand jury is selected after the grand jury has been impaneled from among those who have been impaneled. His only duties are ministerial. He has no special powers or duties, beyond those borne by every grand juror, that meaningfully affect the rights of persons charged with crime. The failure of a federal grand jury foreman to carry out those ministerial duties placed upon him by F.R.Cr.P. 6(c) generally will not invalidate an indictment. See, e.g., Frisbie v. United States, 157 U.S. 160, 15 S.Ct. 586, 39 L.Ed. 657 (1895).

"The impact of the federal grand jury foreman, as distinguished from that of any other grand juror, upon the criminal justice system and the rights of persons charged with crime is minimal and incidental at best. Any suspicion that his office may enlarge his capacity to influence other grand jurors is too vague and uncertain to warrant dismissal of indictments and reversals of convictions.

The roles of grand jury foremen in the federal system differ substantially from the roles of grand jury foremen in Tennessee and other states. Federal grand jury foremen are without the significant powers authorized for Tennessee grand jury foremen. Their role is so

little different from that of any other grand juror that the rights of defendants are adequately protected by assurance that the composition of the grand jury as a whole cannot be the product of discriminatory selection.

We respectfully disagree with the contrary conclusion of the Eleventh Circuit in Perez-Hernandez."

702 F2d at 470-471, T.A. 17-18.

SUMMARY OF ARGUMENT

This case brings to the Court a situation wherein for a seven year period from 1974 through 1981, the judges of the United States District Court for the Eastern District of North Carolina appointed only white males as forepersons of the fifteen Grand Juries which served during that period.

The Court of Appeals found no fault with the exclusion of blacks and women from the leadership roles on the grand juries. Referring to Federal Rule of Criminal Procedure 6(c), the Court concluded that the duties of the foreperson are "ministerial" only, and that the "impact of the federal grand jury foreman", as distinguished from that of any other grand juror, "upon the criminal justice system and the rights of persons charged with crime is minimal and incidental at best."

The Court further concluded that the "roles of the grand jury foreman in the federal system" differ substantially "from the roles of the grand jury foremen in Tennessee and other states." The Court below thereby purported to distinguish this case from Rose v. Mitchell, 443 U.S. 545 (1979) (the Tennessee Judges there appointed only white males as foremen of Tennessee grand juries).

In Part I of this brief, the Petitioner demonstrates that the duties of the foreperson of the federal grand jury is far more than "ministerial", and that his authority and influence (and consequent impact upon the criminal justice system) far transcends that of the other jurors.

Going beyond the surface of Federal Rule of Criminal Procedure 6(c), examination of the Handbook For Federal Grand Jurors and the Model Charge to Grand Jurors discloses at least eight

significant functions imposed upon the foreperson. Many more, of an informal nature, are set forth in the opinions of the federal Courts of Appeals. Moreover, the twenty or so Federal District Court Judges who have appointed forepersons to head the federal grand juries testify to the importance of the position when they explain that they seek out for this post jurors with education, business experience, leadership ability; someone in brief who can hold the other jurors together, someone who can stand firm against the pressures of the prosecuting attorney. Petitioner, then, sets forth the expert testimony of the social psychiatrists in the cases, who vouch that the juror selected in open court by the federal judge to preside over the others thereby gains instant authority; authority augmented as the foreperson performs his ex officio roles. Finally, Petitioner

surveys the literature of the social psychologists whose studies fully support the conclusions of the expert trial testimony. In short, Petitioner demonstrates in Part I that the foreperson plays a significant, even a dominant role, in the proceedings and deliberations of the federal grand jury. In Part II of the brief petitioner demonstrates that the systematic and sustained exclusion of blacks and women from leadership positions on the federal grand jury is a constitutional wrong as a matter of law, regardless of any individual prejudice or harm.

Reference is first made by way of analogy to the state cases arising under the Equal Protection Clause of the Fourteenth Amendment, and more recently under the Sixth Amendment as carried over to the state by the Fourteenth. These cases span a century of legal experience,

and establish from the first that the criminal defendant, indicted by a grand jury from which a distinct class of persons is systematically excluded, without heavy justification, is entitled to have his case considered a second time before a grand jury which suffers no such taint. The unbroken line of cases establish that the convicted defendant need demonstrate no particularized harm, for: "It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community. For racial discrimination to result in the exclusion from jury service of otherwise qualified groups not only violates our Constitution and the laws enacted under it but is at war with our basic concepts of a democratic society and a representative government." Smith v. State of Texas, 311 U.S. 128, 130

(1941).

Turning next to the federal cases decided under the "supervisory" power of this Court, we find that the learning of the state cases is repeated, but in even stronger language. See, e.g., Glasser v. United States, 315 U.S. 60 (1942); Thiel v. Southern Pacific Co., 328 U.S. 217 (1946), and Ballard v. United States, 329 U.S. 187 (1946). Thus in Ballard, the court concluded that "reversible error does not depend on a showing of prejudice in an individual case," for "the injury is not limited to the defendant--there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts." 329 U.S. at 195.

In Part III of the brief Petitioner adverts to the history of the Grand Jury and its evolution as a body to provide

"primary security for the innocent against hasty, malicious, and oppressive prosecution," Wood v. Georgia, 370 U.S. 375, 390 (1962).

Petitioner also points out that the Grand Jury may be used for ill as for good. Respected and responsible commentators have questioned the value of the grand jury as presently constituted. It has been abolished in England, with few to mourn its demise. Even the Model Charge to the Grand Jurors recognizes that the institution of the Grand Jury has been criticized for "allegedly acting as a mere rubber stamp approving prosecutions that are brought before it by government representatives." Handbook for Federal Grand Jurors, p. 31.

Petitioner submits that if the Grand Jury is to stand as a protective bulwark between the citizen and an over-zealous prosecutor, it must represent, and be

represented by, all the people; without
exclusion based on color, race, or sex at
any level of participation.

THE FOREPERSON OF A FEDERAL GRAND JURY IS NOT A MERE CYPHER. HE OR SHE IS VESTED WITH SINGULAR POWER AND AUTHORITY EX OFFICIO, POWER AND AUTHORITY AUGMENTED BY APPOINTMENT IN OPEN COURT BY A FEDERAL JUDGE. IT FOLLOWS THAT THE SYSTEMATIC AND LONG CONTINUED EXCLUSION OF BLACKS AND WOMEN FROM THIS POSITION BY FEDERAL DISTRICT JUDGES CANNOT BE CONDONED.

It is undisputed that no black had been appointed by the federal judges in the Eastern District of North Carolina to serve as foreman of any of the fifteen grand juries convened during the years 1974-1981, and no women.

The Court of Appeals below held that this long continued discrimination was immaterial, because the foreperson of a federal grand jury "has no special powers beyond those borne by every grand juror that meaningfully affect the rights of persons charged with crime," and because

the impact of the federal grand jury foreman, as distinguished from that of any other grand juror, "is minimal and incidental at best." 702 F2d at 470-471.

The Court arrived at its conclusion by reference to Federal Rule of Criminal Procedure 6(c). Section 6(c) provides that the court shall appoint one of the jurors to be foreman; and that the foreman shall have the following powers: to administer oaths, to keep a record of the jurors' votes, and report indictments (and "no bills") to the Court. But 6(c) is only the tip of the iceberg; the grand jury foreperson exercises far more leadership than disclosed in this one brief provision of the Federal Rules.

The Handbook for Federal
Grand Juries and Model Charge

The official Handbook For Federal
Grand Juries, prepared by the Judicial

Conference Committee on the Operation of the Jury System; and the Model Charge, approved and recommended to the United States District Courts in 1978 by the Judicial Conference of the United States, augment the bare-bones stricture set forth in Rule 6(c). The Model Charge is attached to and begins at page 19 of the Handbook.

The Handbook provides that after the proper number of persons have been qualified as grand jurors, "the court will appoint one of them to be the foreman, or presiding officer, of the grand jury." p. 9 (emphasis supplied). Thereafter, the Handbook designates eight other leadership roles.

First, the foreperson presides, with all the power that goes with the gavel. Handbook, p. 9.

Second, the foreperson must be notified by other grand jurors if they are

unable to attend scheduled meetings.

Handbook, p. 10. They are charged that "if an emergency prevents your personal attendance at a meeting, you must promptly advise the grand jury foreperson who has the authority to excuse you from attendance." Handbook, p. 25 (emphasis supplied)

Third, the foreperson administers the oath to the witnesses as they appear. Handbook, p. 11. Thus, he has custody of the bible; and is authorized to proceed by way of affirmation when appropriate.

Fourth, the foreperson initiates the juror's interrogation of all witnesses. Handbook, p. 11. The jurors are charged that "Ordinarily, the United States Attorney or one of his assistants questions the witness first. Next, the foreperson questions the witness, followed by other members of the grand jury. Handbook, p. 26.

Fifth, the foreperson determines the need for an interpreter. Grand Jury proceedings are secret, with only the jury, the United States Attorney or his assistant, the witness under examination, and the court reporter in attendance. An interpreter may be brought in but only "if the foreperson determines one is required." Handbook, p. 11.

Sixth, after all witnesses are heard, the foreperson initiates the critical deliberations and votes. Handbook, p. 13. The jury is charged that "after all persons other than the grand jury members have left the room, the foreperson will ask the grand jury members to discuss and vote upon the question..." Handbook, p. 29.

Seventh, the foreperson keeps a tally of all votes, communicates with the Court in this regard, and is authorized to deputize others for some of these tasks.

The Handbook provides that the foreperson "must keep a record of the number of jurors concurring in the finding of every indictment and file the record with the Clerk of Court." p. 23. The grand jury is charged that the foreperson shall designate another juror to serve as secretary, and the latter shall keep a record of the number of jurors concurring in the finding of every indictment." Handbook, p. 30.

Eighth, the foreperson is the chief clerk and official communicator with the Court. He or she must sign and endorse all true bills "found with the concurrence of at least 12 grand jurors" whether the foreperson voted for or against the finding of the indictment. If the jury votes not to indict an individual who either is in jail or out on bail, the foreperson must immediately so report to the Court, "so that he may be promptly

released." Handbook, pp. 13, 30-31.

Finally, the foreperson is charged with the "security function" of collecting and keeping any notes made by the other grand jurors.

In sum, under the Handbook and Model Charge, the foreperson is the chair, or presiding officer, responsible for the entire conduct of the investigation. He or she excuses other members in emergency situations, assures the presence of a quorum, excludes the unauthorized, initiates and guides the critical deliberations. The foreperson takes the votes, signs the official documents, administers the oaths, and responds for the others in open court.

These are the formal obligations and responsibilities set forth in the official Handbook for Federal Grand Jurors and Model Charge. But there are obligations and responsibilities of a less formal

nature. Some of them are identified in
United States v. Cross, 708 F2d 631 at 637
(11th Cir. 1983):

"For example, the foreperson decides when to contact the district judge, and the foreperson consults with the judge outside the presence of the grand jury. Communications between the United States Attorney's office and the grand jury are through the foreperson. The foreperson decides when to convene and recess the grand jury. The foreperson, acting alone, may excuse grand jurors on a temporary basis. The foreperson may decide the order in which witnesses are called. The foreperson maintains order in the grand jury. The foreperson helps the United States Attorney decide whether to initiate contempt proceedings against recalcitrant witnesses. And according to an offer of proof made by Cross in the trial court, Assistant United States Attorneys were even prepared to testify that on occasion they had sought grand jury subpoena approval from the foreperson acting alone without the consent of the entire grand jury. These duties and responsibilities, and numerous others, considered in isolation, may under certain circumstances seem "ministerial." However, the overall extent and nature of the

foreperson's responsibility for the very functioning of the grand jury should not permit the conclusion that the position is constitutionally insignificant.

The Court added in the footnote that:

7. The record in this appeal includes correspondence between a grand jury foreperson and District Judge Owens which reflects a substantial role on the part of the foreperson and in determining the grand jury's schedule.

No mere cypher, the foreperson. He or she is "primus inter pares" with the other members of the grand jury in the same sense that University Presidents are sometimes described as "first amongst equals" with the University professors. It just is not so.

Statements of the Federal Judges
Responsible for the
Appointment of Forepersons.

The federal judges who appoint the grand jury forepersons know that their function is not "minimal and incidental

at best." They appreciate the special powers or duties of those who preside over grand jury sessions, and try to appoint persons capable of the task. If the duties of the forepersons were purely ministerial, a person with clerical experience would suffice. But the judges look for far more than that. Almost uniformly they select as forepersons those with good management skills, strong occupational experience, the ability to preside, good educational background, personal leadership qualities; and someone who "can not easily be led by the United States Attorney." United States v. Cross, 708 F2d 631, 636 (11th Cir. 1983).

The District Court Judges have been called to testify about their appointments in a number of cases: two United States District Judges for the District of South Carolina (Charleston Division) in United States v. Manbeck, 514 F. Supp. 141 at 150

(D. S.Car. 1981); eight United States District Judges for the Northern District of Georgia in United States v. Northside Rlty. Assoc., 510 F. Supp. 668 at 683-684 (N.D. Ga. 1981); two Judges in the Northern District of Florida in United States v. Holman, 510 F. Supp. 1175 (N.D. Fla. 1981); eight judges for the Southern District of Florida in United States v. Jenison, 485 F. Supp. 655, 665-666 (S.D. Fla. 1979); nine judges in the Northern District of Georgia in United States v. Breland, 522 F. Supp. 468 at 471-474 (N.D. Ga. 1981).

The testimony of these twenty or so judges run a pattern. They take the responsibility of appointing a grand jury foreperson with great concern. Typically, they will review the information provided in the jury questionnaires, observe the appearance and speaking voice of the

various jurors during the impaneling, and make a selection based on the criteria summarized above by the Court in United States v. Cross.

Since the factors which each judge considers are somewhat individualized, a few representative statements are set forth below to give some flavor of the appointment process in actual operation. The testimony below is selected from that of the nine judges in Breland, but is similar to that by the other judge in the other cases.

Judge Robert L. Vining, testified that, based on his personal observations of 40 state grand juries while he was district attorney in the Georgia state courts, the foreperson occupies a "vital position" -- "[o]therwise you've got twenty-three people running off in twenty-three different directions." Judge Vining described desirable qualities in a foreperson as follows:

[H]e or she has to be a person who basically can operate, run a business, a

board, so as to speak, of a business, with some degree of firmness, not be arbitrary. I think a foreman has to be a strong person in that it is--the grand jury is dealing with the government and, after all, the grand jury is the only thing that stands between a defendant and trial.

Judge Richard C. Freeman, a ten-year veteran on the bench, was interested first in a person's education and next in the job position. His reasoning was as follows:

I think that the person who functions as the grand jury foreperson needs to have some sort of ability to lead and to make decisions, and I think the more education a person has--and that doesn't make him any brighter than anybody else, doesn't make him any more intelligent, but it means that he has pursued a course in life that perhaps might equip him better, or her better, to do a particular function such as this.

In the absence of any outstanding educational background, I would then look to present job position.

Judge Newell Edenfield, for 14 years a member of the court, considered each questionnaire,

making several tentative choices before reaching a final decision. He was concerned with the education and employment of the grand jurors in selecting forepersons and deputies. Age was also a factor, since he did not ordinarily appoint someone of extreme old age or extreme youth, but was seeking "level headed" persons. Judge Edenfield stated that he would be a "little suspicious" of appointing as foreperson someone who indicated as employment "housewife" even if she was educationally qualified "[b]ecause [he] wouldn't think [such person] would have the necessary knowledge of the dealings in the community dealing with the various problems that come up in the business world, the commercial world, social world. That is, it's not likely they would."

Judge William C. O'Kelley, a district judge since 1970, first reviewed every juror questionnaire to look for education and employment. He then observed prospective grand jurors in the courtroom as they were identified and answered the roll call to determine "whether they were forceful," and he chose "a person who [he] considered to be a good presiding officer." He thought the foreperson and deputy should have "a substantial educational background and ... employment

background that [indicated] some managerial ability." Judge O'Kelley stressed that he usually had several possible choices in mind and made his final decision after hearing them respond. On cross-examination, the judge expressed the view that a "good presiding officer" was one: who can handle ... and control people and control meetings, maintain order."

Chief Judge Charles A. Moye, Jr., similarly considered the education and experience of prospective grand jurors in selecting forepersons and deputies. He attempted to select as foreperson "the person that appeared ... strongest in administrative or leadership ability. And the deputy would ... be the second person." It was Judge Moye's practice to tentatively select four names from the list before entering the courtroom and then make final decision after acting upon requests for excuse.

Why would these judges give this time and consideration to the appointment of grand jury forepersons if they have "no special powers"? Obviously, the judges with the responsibility for appointment, those on the firing line, so to speak, do

not believe the position is to be so denigrated. They believe, obviously, that the duties of the forepersons are not merely "ministerial". They believe, obviously, that there are special powers or duties in the foreperson far beyond that borne by the other jurors.

The Theoretical Evidence;
Testimony of the Social Psychiatrists

In three cases, there was "theoretical" testimony concerning the significance of the role played by the foreperson of the grand jury. United States v. Musto, 540 F. Supp. 346, 359-360 (D. N. Jersey 1982); United States v. Northside Rlty. Assoc., 510 F. Supp. 668, 683 (N.D. Ga., 1981); and United States v. Breland, 522 F. Supp. 468, 471 (N.D. Ga. 1981).

Dr. John McConahay, an expert in group dynamics at Duke University,

testified in all three cases that the appointment of the foreperson by the judge in the presence of the other jurors conferred upon the foreperson certain power and influence not held by other jurors. The court in Musto summarized the testimony in condensed form as follows:

"In support of this theory, defendants adduced testimony of social psychologists, who testified that the foreperson is perceived by other jurors as having special influence. This influence derives from several bases of social power identified by social psychologists. The types of power include: legitimate power, through which the person within the group grants the leader the right to influence him or her; expert power, through which the leader is seen to have special knowledge; information power, through which the leader is seen as having special information about the specific case; and coercive power, through which the leader has control of reward and punishment for the group and its members.

Dr. John McConahay, a social psychologist, testified that when the judge, who is viewed by the court as being neutral,

knowledgeable in the law, fair, and just, chooses a foreperson in the presence of other jurors, he confers upon the person selected legitimacy. The foreperson's legitimate power is then enhanced by his performing purely ministerial acts, such as administering oaths and signing indictments. This legitimate power of the foreperson, it is contended, also results in the attribution to him of other bases of social power. For example, other members of the jury may perceive that the foreperson is an expert because he is selected by another perceived expert, the judge.

540 F. Supp. 346 at 359-360.

In Northside Realty Assoc., Dr.

McConahay testified that:

"the influence of an imposed leader, as one appointed by a judge to be a grand jury foreperson, is apt to be greater than that of other members of the grand jury. Since the foreperson might be perceived as having more expertise if chosen by a judge, he opined that a judge-appointed foreperson would likely exercise considerable influence over the grand jury's deliberations. 510 F. Supp. 668 at 683.

Professor Hans Zeisel, author of The

American Jury, testified in the Bréland case regarding the role of the foreperson in petit juries. His studies indicate that the role of the foreperson is "dominant" in that the foreperson contributed 25% of the comments during the jury deliberations; and "persuasive" in that the foreperson's initial feeling concerning a case coincided with the jury's ultimate finding in more cases than did the initial feelings of other jurors. Professor Zeisel agreed with Dr. McConahay that the influence of a foreperson would be increased if appointed by a judge, and that the leader of any group becomes more important as the size of the group increases. 522 F. Supp. 468 at 471.

The McConahay/Zeisel testimony has full support in the literature of social psychology.

Dr. A. Paul Hare in his Handbook of Small Group Research (The Free Press, a

division of Macmillan Publishing, 1962) tested the interaction in four different permanent and temporary groups and concluded that "individuals with high formal rank in a group will have more influence on a group decision than those with low rank." p. 141. A study of "power and influence" in controlled groups of various sorts, led to these conclusions:

"The influence of a member in the informal structure will be enhanced if he is placed in a formal position of leadership."

"An individual will try to exert more influence if he is placed in the leader role."

"Whether the power of a person is based on legitimacy, ability to coordinate group activity, or some other factor, the more he attempts to influence another person, the more he will be successful."

"Subjects will pay more attention and respond more favorably to persons of high power than to persons of low power." pp. 284-285

Dr. Terence K. Hopkins in The Exercise of Influence in Small Groups (The Bedminster Press, 1964) elaborates on fifteen basic propositions. One of them is that "For any member of a small group, the higher his rank, the greater his influence." p. 86 ff. For similar conclusions, see Paul V. Crosbie, Interaction in Small Groups (Macmillan Publishing Co., 1975) at 351; and H. L. Nixon II, The Small Group (Prentice-Hall, Inc. 1979), pp. 188-189.

F. Strodtbeck, R. James and Charles Hawkins' studies on the Social Status in Jury Deliberations, is included in a volume on Interpersonal Behavior In Small Groups (Prentice-Hall, Inc. 1973), edited by R. Ofshe. They studied the participation in group discussion by different jurors, and concluded that "the foreman was responsible for approximately

one-fourth of the total acts.* The "latent premise in the study of participation" was that "high participation" indicates greater ability to influence others. This was supported by the study.

* Immediately prior to trial in this case, the Government made available to the Petitioner the grand jury testimony of those it intended to call as witnesses. An examination of these transcripts supports the experiments of the social psychiatrists. On the first day of the grand jury, Oct. 28, 1980, it heard testimony from witnesses Ken Durham, Benjamin Carraway, and R. D. Locklear. Eight grand jurors asked Ken Durham a total of 45 questions, with the foreman asking 14. Benjamin Carraway was asked eight questions, all by the foreman. R. D. Locklear was asked 26 questions by five different jurors, 6 by the foreman. In total, 79 questions were asked on the first day, with the foreman asking 28. Juror #11 was next in the number of questions asked, with 15.

It is notable that during the testimony of the first witness Ken Durham, the foreman interrupted the questioning by the U.S. Attorney with questions of his own (p. 14 of the transcript), and on another occasion suggested to Juror #11 that he "hold his question for one of the people from the department of Natural Resources." (p. 56 of transcript).

The voluminous grand jury transcripts were not made part of the record.

"Jurors were asked before the deliberation what, if anything, they would award the plaintiff. A detailed examination of predeliberation awards of the individual juror with the subsequent group awards in 29 deliberations reveals that the more active jurors, shifted their predeliberation positions less than less active jurors, in the process of agreeing with the group verdict." at pp. 188-189.

Thus, once one goes beyond the surface of Rule 6(c); and looks at the duties set forth in the official Handbook for Federal Grand Jurors and Model Charge, listens as the Courts explain the unofficial obligation, heeds the testimony of numerous federal judges concerning the basis for their foreperson appointments, and examines the evidence and literature of the social psychologists, it becomes indisputable that the authority of the foreperson is not "minimal and incidental" as claimed by the Court below. To the contrary, the foreperson of the federal

grand jury has special powers far beyond those borne by the other grand jurors, and these powers meaningfully affect the rights of persons charged with crime.

But even if this were not so, regardless of whatever importance adheres to the office of grand jury foreperson, this Court cannot countenance racial and sexual discrimination in the appointment to that office. As this Court recently held in Rose v. Mitchell, 443 U.S. 545 (1979), such discrimination "is especially pernicious in the administration of justice" 443 U.S. at 555, and constitutes reversible error without showing of individual harm. For over 100 years, this court has echoed the refrain spelled out in Ballard v. United States, 329 U.S. 187 (1946): "The injury is not limited to the defendant--there is injury to the jury system, to the law as an institution, to the community at large, and to the

democratic ideal reflected in the
processes of our courts." 329 U.S. at
195.

We next turn to this history.

REGARDLESS OF PREJUDICE, THE UNBROKEN PRACTICE OF THIS COURT FOR OVER ONE HUNDRED YEARS HAS BEEN TO REVERSE CRIMINAL CONVICTIONS WHEN THE INDICTING GRAND JURY IS CONSTITUTIONALLY TAINTED AS HERE, BY THE UNLAWFUL EXCLUSION OF SIGNIFICANT COMMUNITY GROUPS.

Petitioner has demonstrated in Part I of the brief that the foreperson plays a significant role in deliberations and other functions of a federal grand jury; far above the role played by the other individual members. It follows that the sustained and purposeful exclusion of blacks and women from this appointed leadership post requires the reversal of any conviction resulting from an indictment by a grand jury so tainted.

In this section of the brief, Petitioner will demonstrate that the exclusion of black and women, qua

exclusion alone, requires the reversal of the conviction.

In Rose v. Michell, the Court summarized a century of litigation in this area of the law and concluded as follows:

Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice. Selection of members of a grand jury because they are of one race and not another destroys the appearance of justice and thereby casts doubt on the integrity of the judicial process. The exclusion from grand jury service of Negroes, or any group otherwise qualified to serve, impairs the confidence of the public in the administration of justice. As this Court repeatedly has emphasized, such discrimination "not only violates our Constitution and the laws enacted under it but is at war with our basic concepts of a democratic society and a representative government." Smith v. Texas, 311 U.S. 128, 130 (1940) (footnote omitted). The harm is not only to the accused, indicted as he is by a jury from which a segment of the community has been excluded. It is to society as

defendant--there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts." Ballard v. United States, 329 U.S. 187, 195 (1946).

Because discrimination on the basis of race in the selection of members of a grand jury thus strikes at the fundamental values of our judicial system and our society as a whole, the Court has recognized that a criminal defendant's right to equal protection of the laws has been denied when he is indicted by a grand jury from which members of a racial group purposefully have been excluded. E.g., Neal v. Delaware, 103 U.S., at 394; Reece v. Georgia, 350 U.S., at 87. For this reason, the Court also has reversed the conviction and ordered the indictment quashed in such cases without inquiry into whether the defendant was prejudiced in fact by the discrimination at the grand jury stage. Since the beginning, the Court has held that where discrimination in violation of the Fourteenth Amendment is proved, "[t]he court will correct the wrong,

will quash the indictment [,]
or the panel [;] or, if not,
the error will be corrected in
a superior court,' and
ultimately in this court upon
review," and all without regard
to prejudice. Neal v.
Delaware, 103 U.S., at 394,
quoting Virginia v. Rives, 100
U.S. 313, 322 (1880).

443 U.S. at 555-556

Rose v. Mitchell originated in the
state courts and arises under the Equal
Protection Clause of the Fourteenth
Amendment. Nonetheless, a brief review
of the cases decided under the
Fourteenth Amendment is appropriate, as
those cases set the tone when this Court
reviews similar situations originating
in the federal courts and arising under
its supervisory powers.

If it is unlawful under the
Fourteenth Amendment for state court
judges to appoint only white males to
serve as forepersons of state grand
juries, it would appear a fortiori

that this Court would not condone the appointment of only white males by federal judges to serve as forepersons of federal grand juries. On this supposition, we will briefly trace the developments of the "state cases", and then discuss the "federal cases" decided under this Court's supervisory power.

The State Originated Cases
Decided Under The
Fourteenth Amendment

The civil rights litigation concerning grand juries began more than one hundred years ago with Strauder v. West Virginia, 100 U.S. 303 (1880); Virginia v. Rives, 100 U.S. 313 (1880); and Ex Parte Virginia, 100 U.S. 339 (1880).

Strauder was a black man, indicted by a West Virginia grand jury from which black men were excluded by express provision of a West Virginia statute.

The Court held that the fact this exclusion because of race was in violation of the Fourteenth Amendment "ought not to be doubted." The Court wrote as follows:

"Nor would it be if the persons excluded by it were white men. If in those States where the colored people constitute a majority of the entire population a law should be enacted excluding all white men from jury service, thus denying to them the privilege of participating equally with the blacks in the administration of justice, we apprehend no one would be heard to claim that it would not be a denial to white men of the equal protection of the laws. Nor if a law should be passed excluding all naturalized Celtic Irishmen, would there be any doubt of its inconsistency with the spirit of the amendment. The very idea of a jury is a body of men composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds. And how can it be maintained that compelling a

colored man to submit to a trial for his life by a jury drawn from a panel from which the State has expressly excluded every man of his race, because of color alone, however well qualified in other respects, is not a denial to him of equal legal protection?

Strauder v. West Virginia, 100 U.S. at 308-309. The remedy was to remove the case to the federal courts where it could be begun all over again before a grand jury free from racial taint. 100 U.S. at 312.

Virginia v. Rives, 100 U.S. 313 (1880) also involved a black man indicted for murder by a grand jury selected from a venire composed "entirely of the white race." The exclusion of blacks, unlike the situation in West Virginia, was not pursuant to the mandate of state statute. Therefore, this Court held that removal to the federal system was

not proper; that the defendant should seek redress within the state system where the Virginia courts could "correct the wrong", "quash the indictment." The court summarized as follows:

If, as in this case, the subordinate officer whose duty it is to select jurors fails to discharge that duty in the true spirit of the law; if he excludes all colored men solely because they are colored; or if the sheriff to whom a venire is given, composed of both white and colored citizens, neglects to summon the colored jurors only because they are colored; or if a clerk whose duty it is to take the twelve names from the box rejects all the colored jurors for the same reason,--it can with no propriety be said the defendant's right is denied by the State and cannot be enforced in the judicial tribunals. The court will correct the wrong, will quash the indictment or the panel, or, if not, the error will be corrected in a superior court.

100 U.S. at 322.

Ex Parte Virginia, 100 U.S. 339 is the third of the 1880 trilogy. There, a state judge "excluded and failed to select" for the grand and petit jury "citizens of African race and black color." He was indicted under the Civil Rights Act of 1875, and filed this suit for habeas corpus. The Court denied the writ because section 1 of the Fourteenth Amendment secures

"to colored men, when charged with criminal offenses against a state, an impartial jury trial by jurors indifferently selected or chosen without discrimination against such jurors because of their color";

And because section 5 of the Fourteenth Amendment empowers Congress to enforce this right by means of a criminal indictment.* 100 U.S. at 354.

* Ex Parte Virginia is a rare example of an attempt to secure immunity from racial discrimination in jury selection by way of criminal (footnote continued on the next page)

(1881) was next in the line of grand jury cases to reach this court. Neal was indicted for the crime of rape. He moved to quash the indictment because the court "in selecting persons to serve as grand jurors . . . selected no persons of color or African race to serve as such jurors." 103 U.S. at 374.

This Court per Mr. Justice Harlan, held it was error not to quash the indictment. The facts of record were that "no colored citizen had ever been summoned as a juror in the courts of the State--although its colored population . . . exceeded twenty-six thousand, in a total population of less than one hundred and fifty thousand." This was a prima facie case of a denial

sanctions. The almost universal remedy is that set forth in Virginia v. Rives, i.e., to quash the indictment and start all over again.

"of that equality of protection which has been secured by the Constitution." Moreover, the judgment of the Delaware officials that the black race in Delaware was utterly disqualified to sit on juries "by want of intelligence, experience, or moral integrity" was declared by this court to be "a violent presumption", which could not be accepted. 103 U.S. at 397. The Court held that the motion to quash must be granted, otherwise as it said in closing, "the constitutional prohibition has no meaning." 103 U.S. 397.

These four early cases set the precedent for the intervening century of litigation under the Equal Protection Clause of the Fourteenth Amendment.

Not once has the Court wavered from its 1880 holdings that "it is a denial of the equal protection of the laws to try a defendant of a particular race or

color under an indictment issued by a grand jury . . . from which all persons of his race or color have, solely because of that race or color, been excluded by the state." Hernandez v. Texas, 347 U.S. 475 at 477 (1954).

Not once has the Court departed from its holding in Virginia v. Rives that the appropriate remedy when fault is found is to quash the indictment. To the contrary, the necessity of this remedy has been reaffirmed on the few infrequent occasions when it has been called into question. See, e.g., Pierre v. State of Louisiana, 306 U.S. 354 (1939); Cassell v. Texas, 339 U.S. 282 (1950); Rose v. Mitchell, 443 U.S. 545 (1979)*.

*In Pierre, the state trial judge ruled that a tainted grand jury makes no difference, as it only presents indictments. The state judge below recognized that the petit jury, which (footnote continued on the next page)

Not once has this Court deviated from its holding in Neal v. Delaware that a prima facie case of discrimination may be established by statistics. This is now known as the "rule of exclusion" described in Costandeda v. Partida, 430 U.S. 482, 494-495 (1977) as follows:

"in order to show that an equal protection violation has occurred in the context of

decides guilt or innocence, must be free from taint

In Cassell, Mr. Justice Jackson voiced a lone objection by arguing that federal courts should not set aside criminal convictions solely on the ground that discrimination occurred in the selection of the grand jury, so long as no constitutional impropriety tainted the selection of the petit jury, and guilt was established beyond reasonable doubt at a trial free from constitutional error.

In Rose, Mr. Justice Stewart raised the same issue, and concluded that "the time has come to acknowledge that Mr. Justice Jackson's question is unanswerable, and to hold that a defendant may not rely on a claim of grand jury discrimination to overturn an otherwise valid conviction." 443 U.S. at 574-575. Mr. Justice Rehnquist joined in this opinion.

grand jury selection, the defendant must show that the procedure employed resulted in substantial underrepresentation of his race or of the identifiable group to which he belongs. The first step is to establish that the group is one that is a recognizable distinct class, singled out for different treatment under the laws, as written or as applied.

Hernandez v. Texas, 347 US, at 478-479, 98 L Ed 866, 74 S Ct 667. Next, the degree of underrepresentation must be proved, by comparing the proportion of the group in the total population to the proportion called to serve as grand jurors, over a significant period of time. *Id.*, at 480, 98 L Ed 866, 74 S Ct 667. See Norris v. Alabama, 294 US 587, 79 L Ed 1074, 55 S Ct 579 (1935).

This method of proof, sometimes called the "rule of exclusion," has been held to be available as a method of proving discrimination in jury selection against a delineated class.

Hernandez v. Texas, 347 US, at 480, 98 L Ed 866, 74 S Ct 667.

Finally, as noted above, a selection procedure that is susceptible of abuse or is not racially neutral supports the presumption of discrimination raised by the statistical

showing. Washington v. Davis, 426 US, at 241, 48 L Ed 2d 597, 96 S Ct 2040; Alexander v.

Once the defendant has shown substantial under-representation of his group, he has made out a prima facie case of discriminatory purpose, and the burden then shifts to the State to rebut that case."

Finally, as in Neal v. Delaware, it remains a "violent presumption" that all members of a group may be disqualified "by want of intelligence, experience or moral integrity." The state may not rebut a prima facie case by reference to a "high standard qualification for jurors", or by "general assertions by officials" that they did not discriminate on the basis of race. Norris v. Alabama, 294 U.S. 587, 593, 598-599 (1935). With a large number of blacks from which to choose, there "is no room for inference" that there are not among them qualified jurors who meet the test "of good moral character, who

can read and write." Hill v. Texas, 316 U.S. 400, 403 (1942). See also Eubanks v. Louisiana, 356 U.S. 584, 587 (1958); Turner v. Fouche, 396 U.S. 246, 361 (1970).

The State Originated Cases
Decided Under the Requirement
of the Sixth and Fourteenth
Amendments That There Be a
"Fair Cross Section."

The "Equal Protection" cases discussed above were assumed to include a "same class" rule, i.e., that the defendant must be a member of the excluded class. On this theory, prejudice could be presumed. In recent years, since the 1968 decision in Duncan v. Louisiana, 391 U.S. 145 that the Sixth Amendment right to a jury trial is made applicable to the states through the Due Process Clause of the Fourteenth Amendment, the Court has required a "fair cross section",

regardless of the "same class rule",
regardless of actual prejudice.

This development was presaged by
Peters v. Kiff, 407 U.S. 493 (1972).
Peters, convicted of burglary in the
state courts of Georgia, prior to the
decision in Duncan, filed a petition in
habeas corpus in the federal courts on
the allegation that "Negroes were
systematically excluded from the grand
jury that indicted him." The Court of
Appeals affirmed the denial of the
petition because Peters "is not himself
a Negro." 407 U.S. at 494. This Court
reversed because

"whatever his race, a criminal
defendant has standing to
challenge the system used to
select his grand or petit
jury, on the ground that it
arbitrarily excludes from
service the members of any
race, and thereby denies him
due process of law. This
certainly is true in this
case, where the claim is that
Negroes were systematically
excluded from jury service."

The Court was unwilling to assume that the "exclusion of Negroes has relevance only for issues involving race" for

"When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable. It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude, as we do, that their exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented."

407 U.S. at 503, 504.*

* The opinion of the Court was by Mr. Justice Marshall. Mr. Justice Douglas and Mr. Justice Stewart joined the opinion.

Mr. Justice White joined by Mr. Justice Brennan and Mr. Justice Powell concurred in the judgment because since March 1, 1875 the criminal laws of the United States have contained a proscription against the disqualification of any citizen from service as a grand or petit juror "on account of race, color, or previous (footnote continued on the next page)

Peters v. Kiff was a pre Duncan decision, for all practical purposes. After this Court extended the Sixth Amendment right to trial by jury to the States, there were new explorations of what is required in a trial by jury.

Taylor v. Louisiana, 419 U.S. 522 (1975) was the first case to examine the

condition of servitude." Mr. Justice White would implement

"the strong statutory policy of § 243, which reflects the central concern of the Fourteenth Amendment with racial discrimination, by permitting petitioner to challenge his conviction on the grounds that Negroes were arbitrarily excluded from the grand jury that indicted him. This is the better view, and it is time that we now recognized it in this case and as the standard governing criminal proceedings instituted hereafter."

407 U.S. at 507

Mr. Chief Justice Burger, with whom Mr. Justice Blackman and Mr. Justice Rehnquist joined, dissented because there was no "demonstration of prejudice, or basis for presuming prejudice, to the accused." 407 U.S. at 508.

issue. There, women were excluded from jury service in Louisiana unless they "opted in", i.e. unless they filed a written declaration of a desire to be called for jury duty. Few women did, "grossly disproportionate to the number of eligible women in the community."

Billy J. Taylor was indicted for kidnapping, and moved to quash the venire because of the systematic exclusion of women. His motion to quash was denied, and he appealed.

This Court, per Mr. Justice White, first responded as follows, to the state insistence that Taylor, a male, has no standing to object to the exclusion of women:

But Taylor's claim is that he was constitutionally entitled to a jury drawn from a venire constituting a fair cross section of the community and that the jury that tried him was not such a jury by reason of the exclusion of women. Taylor was not a member of the

excluded class; but there is no rule that claims such as Taylor presents may be made only by those defendants who are members of the group excluded from jury service."

The Court cited and relied upon Peters v. Kiff.

The Court then turned to the merits and held that a "fair cross section" requirement is fundamental to the jury trial guaranteed by the Sixth Amendment. The Court explained:

The purpose of a jury is to guard against the exercise of arbitrary power--to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge. Duncan v. Louisiana, 391 US, at 155-156, 20 L Ed 2d 491, 88 S Ct 1444. This prophylactic vehicle is not provided if the jury pool is made up of only special segments of the populace or if large, distinctive groups are excluded from the pool. Community participation in the administration of the criminal law, moreover, is not only

consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system. Restricting jury service to only special groups or excluding identifiable segments playing major roles in the community cannot be squared with the constitutional concept of jury trial.

419 U.S. at 530.

The Court was further persuaded that the fair cross-section requirement is violated by the systematic exclusion of women.

Taylor concerned a situation where the women in Louisiana could "opt in" for jury duty. Duren v. Missouri, 439 U.S. 357 (1979) involved a system wherein women, once called for jury duty, could "opt out". Each system resulted in the exclusion of a disproportionate number of women, each was held to violate the concept of a jury drawn from a fair cross section of

the community.

The Court held that Duren, a man, established a prima facie violation of the fair cross-section requirement when he showed (1) that the group alleged to be excluded is a "distinctive" group in the community (women make up a distinctive group); (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community (women composed 53% of the community, 15% of the jury venires); and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process (the option to "opt out"). 439 U.S. at 364.

The burden then shifts to the state to demonstrate "a significant state interest"; because "the right to a proper jury cannot be overcome on merely

rational grounds." 439 U.S. 367. The Court concluded that the fact that some women might have "preclusive domestic responsibilities" did not justify their disproportionate exclusion on jury venires. 439 U.S. at 369.

The Cases Decided Under the Supervisory Power of this Court: Glasser, Thiel, and Ballard.

This Court has decided three cases under its supervisory power which clearly establish that in the federal judiciary system there is no room for prejudice against any group, no matter who might raise the issue.

Glasser v. United States, 315 U.S. 60 (1942) is the first of these cases. Glasser was an assistant United States Attorney in Chicago, assigned to the prosecution of liquor cases. He was indicted for conspiring with others to defraud the United States, in effect, by

taking bribes to ease up on prosecutions against those who gave the bribes. His contention on appeal was that he had been denied an impartial trial because of the exclusion from the petit jury of all women not members of the Illinois League of Women Voters. The Court, per Mr. Justice Murphy, fully addressed this issue, although it held that the allegation was not sustained by proof.

The Court first noted that trial by jury has been "a prized shield against oppression", the "glory of the English law", a constitutional right "in criminal proceedings in a federal court." 315 U.S. at 84. Further, lest the right to trial by jury be nullified "by improper constitution of juries," our notions of what a proper jury is "have developed in harmony with our basic concepts of a democratic society and a representative government." 315

Turning to the vice of restricting women jurors to those who are members of the League of Women Voters, the Court noted that the officials charged with the selection of federal jurors may "exercise some discretion to the end that competent jurors may be called," but, they:

"must not allow the desire for competent jurors to lead them into selections which do not comport with the concept of the jury as a cross-section of the community. Tendencies, no matter how slight, toward the selection of jurors by any method other than a process which will insure a trial by a representative group are undermining processes weakening the institution of jury trial, and should be sturdily resisted. That the motives influencing such tendencies may be of the best must not blind us to the dangers of allowing any encroachment whatsoever on this essential right. Steps innocently taken may, one by one, lead to the irretrievable impairment of substantial liberties."

Thiel v. Southern Pacific, Co.,

328 U.S. 217 (1946) is the second in the trilogy of federal cases. Thiel was a suit for personal injury in the federal court based on diversity of citizenship. Thiel objected to the entire jury panel, because the clerk of court and the jury commission deliberately and intentionally excluded from the jury list all persons who work for a daily wage.

This Court, per Mr. Justice Murphy, ruled that the motion to strike the jury panel should have been granted, because the "American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community." Moreover, "recognition must be given to the fact that those eligible

for jury service are to be found in every stratum of society." Jury competence "is an individual rather than a group or class matter" and that fact "lies at the very heart of the jury system." 328 U.S. at 220.

The Court concluded that it could not sanction "the method by which the jury panel was formed in this case" and it was therefore required "to reverse the judgment below in the exercise of our power of supervision over the administration of justice in the federal courts. See McNabb v. United States, 318 U.S. 332, 340." On this basis,

"it becomes unnecessary to determine whether the petitioner was in any way prejudiced by the wrongful exclusion or whether he was one of the excluded class."
328 U.S. at 225

Ballard v. United States, 329 U.S. 187 completes the trilogy. Mrs. Ballard was indicted and convicted of mail

fraud. Women were intentionally and systematically excluded from the grand jury which indicted her, from the petit jury which convicted her. Ballard moved to quash the indictment; she challenged the array of the petit jurors. Both motions were denied. The Court, per Mr. Justice Douglas, held this was error.

The Court rejected the contention that Mrs. Ballard suffered no prejudice because "an all male panel drawn from the various groups within a community will be as truly representative as if women were included." The Court pointed out that "the two sexes are not fungible; a community made up exclusively of one is different from a community composed of both; the subtle interplay of influence one on the other is among the imponderables. To insulate the courtroom from either may not in a given case make an iota of difference.

Yet a flavor, a distinct quality is lost if either sex is excluded." 329 U.S. at 193-194.

The Court assumed the woman defendant could or might be prejudiced by the absence of women from the juries, but concluded that:

"reversible error does not depend on a showing of prejudice in an individual case. The evil lies in the admitted exclusion of an eligible class or group in the community in disregard of prescribed standards of jury selection The injury is not limited to the defendant--there is injury to the jury system, to the law as an institution, to the community at large, to the democratic ideal reflected in the processes of our courts." 329 U.S. at 195.

This brief survey of the equal protection cases under the Fourteenth Amendment; the fair cross-section cases under the Sixth and Fourteenth Amendment; the exclusion cases under

this Court's supervisory power makes one thing abundantly clear: prejudice to the defendant, to the jury system, to the democratic process itself is inevitable whenever those responsible for the selection of jury panels begin to pick and choose on the basis of race, of gender, of class or caste.

It follows that the exclusive selection of white males to chair the fifteen grand juries in the Eastern District of North Carolina requires that the indictment in this case be quashed, and that proceedings begin anew without the taint of racial and sexual discrimination.

III

A Prime Purpose of the Grand Jury, To Serve As A Bulwark Standing Solidly Between the Citizen And An Overzealous Prosecutor, Will Be Enhanced By Broader Community Participation At Every Level

In Part I of this brief Petitioner demonstrates that the foreperson of the grand jury makes a difference, that he or she plays a leadership role which may well be decisive. It follows, petitioner contends, that this court cannot countenance a systematic exclusion from this post because of race, color or sex.

In Part II of this brief Petitioner demonstrates that any systematic exclusion of any identifiable group in the community from participation in the administration of justice at the grand jury level is wrong as a matter of law, regardless of individual prejudice.

Here, in Part III, petitioner briefly examines the history of the Grand Jury, some of the major criticisms, and urges that its historic function as a shield against unwarranted prosecution can best be preserved by ensuring a broad based participation of all community elements at every level of operation, including the top. We turn to this now.

The Grand Jury As Primary
Security for The Innocent
Against Hasty, Malicious, And
Oppressive Prosecution

The Grand Jury has roots going back to the 1166 Assize of Clarendon. In that year, Henry II established the "Grand Assize" to help him wrest the administration of Justice from the Church and the feudal barons. M. Frankel and G. Naftalis, The Grand Jury, An Institution on Trial (Hill and Wang,

a division of Farrar, Straus & Giroux)
(1975) p. 6; H. Schwartz,
Demythologizing the Grand Jury, 10 The
American Criminal Law Review 701, 707
(1972).

At first, the jury both accused,
and then tried the accused for his
alleged crime. This continued until
1350, when Parliament forbade grand
jurors from sitting in judgment of those
they had indicted. Thereafter, when one
of the King's traveling judges arrived
to hold court, the Sheriff would select
twelve persons as local petit jurors;
twenty-four others, usually knights, to
serve as an accusing body for the entire
county. These twenty-four, after
eliminating one member to preclude
deadlocks, began investigating
questionable incidents. It was "le
grande inquest". J. Van Dyke, The Grand
Jury: Representative or Elite? 28

Hastings L. Rev. 37, 38 (1976)

The early grand jury was not a protector of the people; it was an arm of the King to keep his peace. H.

Schwartz Demythologizing the Grand Jury, 10 American Criminal Law Review at 710.

It was not until 1681 that the Grand Jury asserted a power to refuse to indict. In that year, in a bitter political struggle between Catholic leaning Crown and Protestant Parliament, the grand jury of London refused to indict Stephen Colledge, and then refused to indict the Earl of Shaftesbury. The grand jurors returned the bill presented by the Royal Prosecutor with the word "ignoramus"; meaning in Latin "we are ignorant", or "we ignore it." Thus began the concept of the grand jury as a protector of the people. As in the mother country,

colonial grand juries undertook to protect the individual from political oppression. The most celebrated case was that of John Peter Zenger, a New York newspaper publisher. The Royal Governor sought to have him prosecuted for criminal libel, but two different New York grand juries in 1743 refused to indict. He was then prosecuted by information--a written accusation drawn by the prosecutor.

In Boston, a grand jury refused to indict those who had led the 1765 riots against the Stamp Act. Four years later a different Boston grand jury indicted British soldiers for offenses against the populace, but refused to indict persons charged with inciting other British soldiers to desert. M. Frankel and Naftalis, The Grand Jury, An Institution on Trial, p. 11.

And it was in Boston, during the

debates on the ratification of the Constitution, that Abraham Holmes complained:

"There is no provision made in the Constitution to prevent the Attorney General from filing information against any person whether he is indicted by the grand jury or not; in consequence of which the most innocent in the Commonwealth may be taken by virtue of a warrant issued in consequence of such information." 2 Elliot's Debates 110 (2d E. 1881), quoted in Van Dyke, The Grand Jury: Representative or Elite? 28 Hastings L. Rev. 37, 39 (1976).

The consequence of this and similar sentiment was the requirement in the Fifth Amendment that "No person shall be heard to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury."

The grand jury "is enshrined in the Constitution" because of its traditional "high place as an instrument of justice

in our system of criminal law." United States v. Sells Engineering, Inc. ___ U.S. ___, 103 S. Ct. 3133, 3137 (June 30, 1983). Historically, it

"has been regarded as a primary security for the innocent against hasty, malicious, and oppressive prosecution; it serves the invaluable function in our society of standing between accuser and accused, whether the latter be an individual, minority group, or whatever, to determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will."

Wood v. Georgia, 370 U.S. 375, 390 (1962).

The Darker Side of The Grand Jury As the Inquisitorial Arm of the Prosecution.

But there is another, and a darker side to the grand jury. Like its progenitor in the Twelfth Century, it remains "a grand inquest", a body with powers of both "investigation and

inquisition." Blair v. United States, 250 U.S. 273, 282 (1919) "No judge presides to monitor its proceedings", United States v. Calandra, 414 U.S. 338, 343 (1974), and it is permitted to return indictments on the basis of testimony which is "incompetent", Holt v. United States, 218 U.S. 245 (1910); or testimony which is entirely "hearsay". Costello v. United States, 350 U.S. 359, 363 (1956). The "exclusionary rule" prohibiting the use of evidence obtained in violation of the Fourth Amendment does not apply, United States v. Calandra, 414 U.S. 338 (1979); and the grand jury may base its verdicts on information obtained in violation of the Fifth Amendment privilege against self incrimination. Lawn v. United States, 355 U.S. 339 (1958). Even the First Amendment right of a newsman to shield his source of information

ordinarily must yield to the demands of the grand jury for pertinent information. Branzburg v. Hayes, 408 U.S. 665 (1972).

The grand jury, now as in the past, is employable in a partisan, political way. In early America, President Jefferson praised the grand jury as a "sacred palladium of liberty" S. Padover, The Complete Jefferson (Quincey Press, 1943) p. 121. But his administration used the grand jury as an instrument of partisan vengeance against his political rival Aaron Burr. A Kentucky grand jury returned an "ignoramus". Then a Mississippi grand jury returned an "ignoramus". Finally, the Jeffersonians obtained a "true bill" from a grand jury in Virginia. After this harrassment, it seems only fitting that Burr was acquitted of all charges after trial by a petit jury. L. Clark,

The Grand Jury, The Use and Abuse of Political Power (Quadrangle, The New York Times Book Co.) p. 21.

A current complaint is that the government often manipulates the grand jury process as an extra legal device for discovery in non-criminal matters. See, e.g. United States v. Baggot, ___ U.S. ___, 103 S. Ct. 3164 (June 30, 1983).

An equally serious complaint, if not more so, is that the grand jury no longer stands as a bulwark, a shield, between the state and the hapless individual; rather it serves as an "arm of the prosecutor". Grand Jury Reform, Report of the Committee on Federal Legislation and the Committee on Civil Rights of the Association of the Bar of the City of New York (1979) p. 3. Even the Model Charge alerts the jurors to criticism that the grand jury is a "mere

rubber stamp" approving "all prosecutions brought before it by the government." Handbook For Federal Grand Juries, p. 31.

In more colorful language, Judge William Campbell, after 32 years on the Federal Bench in Chicago, complained that the grand jury "has long ceased to be the guardian of the people, for which purpose it was created at Runnymede", because

"any experienced prosecutor will admit that he can indict anybody, at any time for almost anything before any grand jury."

Quoted by Mr. Justice Douglas dissenting in United States v. Mara, 410 U.S. 19, 23 (1973).

The short of the matter is that the Grand Jury has its distinguished detractors. After eight centuries, more or less, the grand jury was abolished by England in 1933, and replaced by a

"preliminary hearing screening process."

There were few to mourn its demise. One commentator noted;

"The grand jury has long lagged superfluous on a stage where it once played a great part.... During its last years it was kept in being only by that strong sentiment among lawyers which resents charge however salutary; but though the English people are patient there is a certain vein of common sense in its making, which in the long run prevails."

quoted in S. Dash, The Indicting Grand Jury: A Critical Stage, 10 American Criminal L. Rev. 807, 817, n. 45 (1972).

But for every detractor, there is an equally distinguished defender. Their effort lies not in the way of abolition, but in the way of reform. See generally, D. Emerson, Grand Jury Reform: A Review of Key Issues, a publication of the National Institute of Justice of the U. S. Department of

Justice. Grand Jury Reform, Report of the Committee on Federal Legislation and the Committee on Civil Rights, of the Association of the Bar of the City of New York; M. Frankel and G. Naftalis, The Grand Jury, An Institution on Trial (Hill and Wang, 1977).

The Need for Broad Based
Participation by All Segments
of Society.

One recognized reform is the extension of participation in the grand jury to all segments of society. The grand jurors, it is complained, are too old, too white, too male, too middleclass, too oriented toward prosecution. See J. Van Dyke, The Grand Jury: Representative of Elite? 28 Hastings L. Rev. 37, 58-62 (1976).

The notorious incident concerning the indictment of Black Panther Bobby Seale is oft used to illustrate the

problem. There, the 73 year old Connecticut sheriff hand-picked a grand jury "of people he knew and liked" to serve as a New Haven grand jury. They included fellow members of the Elks Club, his barber, and a former jailor. With one exception, all were white. All were middle aged or older, all were middle class. They were drawn from the various twenty-six townships of New Haven County. In no realistic sense were they "peers" of the young, black, urban dwelling accused from the lower socio-economic classes of society. The grand jury indicted Seale for murder on the uncorroborated testimony of a government informer; and he remained in jail for two years without bail until freed by a split verdict of the petit jury. The Grand Jury: Representative or Elite?, 28 Hastings L. Rev. at 46-48. H. Schwartz, Demythologizing The

Historic Role of the Grand Jury, 10

American Criminal L. Rev. 701, 760-761
(1972).

The body impaneled to represent the community's conscience, the body uniquely designed to act as a shield against government oppression, must be of, from, and by the community. Broad community participation makes a difference.

An empirical study of grand jury indictments (and "no bills") returned by grand juries in Harris County, Texas; as measured by the composition of the particular grand juries, led to the following inter-related conclusions:

a. "over representation of affluent white males has narrowed the range of social and/or political values capable of evoking disagreement among fellow jurors, or with the prosecutor."

b. "homogeneous grand juries will more quickly ...

acquiesce to prosecutorial pressure than their more heterogeneous counterparts."

c. "greater representation of minorities and low income groups may, in part, serve to check the influence of the prosecutor by facilitating discussion and/or controversy in important cases."

C. Davis and C. Rowland, Assessing the Consequences of Ethnic, Sexual, and Economic Representation On State Grand Juries: A Research Note, 5 The Justice System Journal 197 (published by the Institute of Court Management, Denver, Colorado, Winter, 1979).

This Court is well aware of the need for community participation. In giving content to the concept of a "jury", this Court reminded that the:

"number should probably be large enough to promote group deliberation, free from outside attempts at intimidation, and to provide a fair possibility of obtaining a representative cross section of the community.

Williams v. Florida, 399 U.S. 78, 100 (1970), upholding a jury of six members. When Georgia reduced the size of the jury in misdemeanor cases to five, this Court cried "enough". Any reduction below the six permitted in the Florida case would "promote inaccurate and possibly biased decision making", cause "untoward differences in verdicts", and "prevent juries from truly representing their communities." Ballew v. Georgia, 435 U.S. 223, 239 (1978). And New York was not permitted to substitute trial before a panel of three judges for a trial by jury:

"the primary purpose of the jury is to prevent the possibility of oppression by the Government; the jury interposes between the accused and his accuser the judgment of laymen who are less tutored perhaps than a judge or panel of judges, but who at the same time are less likely to function or appear as but another arm of the Government

that has proceeded against him." Baldwin v. New York, 399 U.S. 66, 72 (1970).

But the function of the jury is not a matter of size alone, there is also the matter of content. "A flavor, a distinct quality is lost if either sex is excluded," Ballard v. United States, 329 U.S. 187 at 193-194. The exclusion of any distinct group denies the deliberating jury of

"qualities of human nature and varieties of human experience the range of which is unknown and perhaps unknowable." Peters v. Kiff, 407 U.S. 493 at 503.

The Court of Appeals in United States v. Cross, 708 F2d 631 (11th Cir. 1983) illustrated this point with a footnote reference to the recent case of Bryant v. Wainwright, 686 F2d 1373 (11th Cir. 1983):

_____, 103 S. Ct. 2096, 75 L.Ed.2d ____ (1983), Mattie Lee Bryant was indicted by a

Florida state grand jury for first degree murder of her husband. The grand jury foreperson was a white male, and one of the issues presented to this Court was discrimination in the selection of forepersons. According to the state trial court, the shooting of her husband, allegedly an act of self defense against his beatings, was "probably second degree [murder] or manslaughter at most." See Appellant's Brief at 31, Bryant v. Wainwright, No. 81-5483. In cases such as Mattie Lee Bryant's which present sensitive sexual or racial issues, the composition of the grand jury and the sex and race of its foreperson conceivably could be of critical importance.

708 F2d at 736-373, n. 8.

Similarly in this case. Petitioner was the long time President of the North Carolina AFL-CIO, well known for his aggressive stance on behalf of minorities, and women's rights. Petition for Certiorari, p. 23. The indictment grew out of a continuing series of contracts to train the

unemployed (mostly blacks and women) for decent job opportunities. Petition for Certiorari, pp. 4-5. Audits of CETA contracts in general disclosed 379 with "questioned costs", 55 of them with questioned costs of over \$50,000. Petition for Certiorari, pp. 20, 22. Yet Petitioner was the only person ever to be prosecuted for CETA fraud in the Eastern District of North Carolina. The universal practice in all other situations is to proceed by way of administrative review, and civil suit. Petition for Certiorari, p. 20. The specific substantive charges are technical at best. Petition for Certiorari, pp. 10-15. Who can say, who can deny, here, as in Bryant v. Wainwright, above, that the composition of the grand jury "and the sex and race of its foreperson conceivably could be of critical importance."

CONCLUSION

For the reasons above set forth,
the judgment below should be reversed
with instructions to dismiss the
proceedings against the petitioner.

Respectfully submitted,

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February 15, 1984

No. 82-2140

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In the Supreme Court of the United States

OCTOBER TERM, 1983

WILBUR HOBBY, PETITIONER

v.

UNITED STATES OF AMERICA

*ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT*

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether alleged discrimination in the selection of grand jury forepersons resulting in the underrepresentation of women and blacks in that position provides a basis for reversal of a conviction of a white male defendant upon an indictment returned by the grand jury.

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A19) is reported at 702 F.2d 466. The district court issued no written opinion. The transcript of the district court's ruling from the bench is reproduced at J.A. 110-113.

JURISDICTION

The judgment of the court of appeals was entered on March 9, 1983. A petition for rehearing was denied on April 29, 1983 (see J.A. 123-124). The petition for a writ of certiorari was filed on June 29, 1983, and was granted on December 12, 1983, limited to the third question presented therein (see J.A. 125). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of North Carolina, petitioner and co-defendant Mort Levi were convicted of con-

spiring to defraud the United States of monies appropriated under the Comprehensive Employment and Training Act of 1973 (CETA), 29 U.S.C. (& Supp. V) 801 *et seq.*, in violation of 18 U.S.C. 371 and 665 (Count 1). In addition, petitioner was convicted on three counts of fraudulently obtaining and misapplying CETA grant funds, in violation of 18 U.S.C. 665 (Counts 3, 4, and 5). Petitioner was sentenced to 18 months' imprisonment on Count 1; his sentence to concurrent terms of two years' imprisonment on Counts 3, 4 and 5 was suspended in favor of five years' probation. In addition, he was fined \$10,000 on each count. The court of appeals affirmed (Pet. App. A1-A19).

1. The evidence adduced at trial is summarized in the opinion of the court of appeals (Pet. App. A2-A8). The pertinent background is as follows: At the time of the events that led to this prosecution, in 1979, petitioner was the president of the North Carolina chapter of the AFL-CIO. Petitioner also owned Precision Graphics, Inc., a printing company located across the street from the labor organization's headquarters in Raleigh that sometimes performed work for the chapter. Prior to 1979, the labor organization had been using independent contractors to maintain its membership data in computerized form, but as early as 1977 petitioner had suggested to the chapter's board that the organization should acquire its own computer capacity. Petitioner had also mentioned that there might be CETA funds available for projects the AFL-CIO was interested in (II C.A. App. 1199, 1201). Petitioner was well acquainted with the CETA program; he had entered into 15 CETA contracts between 1977 and 1979.

In early 1979 petitioner's interest in the CETA program and his interest in acquiring a computer for AFL-CIO use began to converge. In January petitioner began discussions with a representative of Mohawk Data Sciences, a firm that had provided equipment for other state AFL-CIO affiliates that was tailored to exchange data with the computers in AFL-CIO national headquar-

ters, concerning acquisition of such a computer for the North Carolina AFL-CIO chapter (I C.A. App. 427-431). Meanwhile, petitioner and co-defendant Levi formed a new company, Precision Data, Inc., which promptly submitted to the North Carolina Department of Natural Resources and Community Development (DNRCD) an application for CETA funds to establish a data processing training program.

Precision Data's proposal was received with some skepticism by DNRCD staff members because officials doubted the need for such a program in the region to be served, and because Precision Data had no staff or plant, nor any experience in data processing training or in the CETA program generally, and would be wholly funded by the proposed grant (II C.A. App. 655-657). Petitioner's funding proposal was modified in response to some of these concerns. Because it was a going enterprise with experience in administering CETA training, Precision Graphics was denominated the grantee in place of Precision Data. On May 21, 1979, DNRCD approved a grant of \$129,429 to Precision Graphics to operate the proposed data processing training program.

Earlier, in April, petitioner, acting on behalf of Precision Data, had agreed to purchase a computer from Mohawk Data Sciences, for \$41,317.68. A deposit of \$10,329.42 was required, with the balance to be paid in 18 monthly installments of \$1721.57 (Gov't Exhs. 8, 40; 3 Tr. 53-56). In addition, Mohawk agreed to provide Precision Data with maintenance service for \$214/month.

On May 21, 1979, the very day that Precision Graphics' CETA application was approved, Precision Data and Precision Graphics entered an agreement for the latter to lease the computer just purchased by the former. A monthly rental of \$3,000 and a maintenance fee of \$125/week was agreed upon. As soon as the CETA contract between DNRCD and Precision Graphics was formalized, petitioner's co-defendant Levi secured an advance of \$43,696, and transferred \$18,000 of that amount to Precision Data, \$9,000 of which was designated for computer

rental charges. Although the computer was not installed until June 15, 1979, on July 3 petitioner issued another check on Precision Graphics' data processing training program account, in the amount of \$5,000, to Precision Data for computer rental. In addition, although Precision Data's obligation to pay Mohawk Data for maintenance services (at a rate of \$214/month) did not accrue until July 16, 1979, Precision Graphics expended CETA grant funds under its maintenance agreement with Precision Data at the rate of \$125/week beginning May 21, 1979. The overcharges thus reaped by petitioner through Precision Data were the basis for the indictment.¹

2. a. Prior to trial, petitioner, a white male, moved to dismiss the indictment "due to improper selection of grand jurors" (J.A. 32).² Invoking the Fifth and Sixth Amendments and provisions of the Jury Selection and Service Act of 1968, 28 U.S.C. (& Supp. V) 1861 *et seq.*, petitioner's motion papers alleged that the administration of the Jury Plan for the Eastern District of North Carolina "failed to ensure grand juries selected at random from a fair cross-section of the community within the District," or that all eligible citizens have a proper opportunity to serve as jurors; that jurors had been excluded from service on the basis of race, economic status, occupation or age; that various geographical subdivisions within the district were not proportionally represented; and that the list of names for the master jury wheel had

¹ Petitioner's scheme began to unravel in August 1979, when DNRCD's Independent Monitoring Unit began to audit Precision Graphics' performance under its CETA contract. Based upon the results of the audit, the matter was referred for possible prosecution. The discrepancy between the rate of the monthly maintenance charge exacted by Precision Data, and its own maintenance costs was the basis for Count 3 of the indictment. The discrepancy between the monthly computer rental charged and the cost to Precision Data of the equipment was the basis for Count 4. The rental charged for the period prior to installation of the computer was the basis for Count 5.

² Petitioner's co-defendant Levi, a black male, apparently joined in petitioner's motion (see I C.A. App. 211).

impermissibly been constituted from the list of persons who had actually voted (J.A. 33-34). No reference was made in this motion to the selection of grand jury forepersons.

The district court held an evidentiary hearing on petitioner's motion to dismiss the indictment. The only witness to testify was James O'Reilly, a statistical social science consultant. O'Reilly testified concerning a comparison he had made between 1970 census data on the racial, employment, educational and age characteristics of the population of the judicial district and the characteristics of a sample drawn from master jury wheel in use in 1977 in the Eastern District of North Carolina (J.A. 64-66). He concluded that various population groups were underrepresented on the master jury wheel as compared with the census figures and that such underrepresentation was attributable to the district jury plan's use of the list of actual voters in the previous presidential election as the source for the names of potential jurors (J.A. 80-84).³

Although no issue as to foreperson selection had been framed by the pleadings, O'Reilly also testified as to the characteristics of the persons selected as grand jury foreperson or deputy foreperson in the district between 1974 and 1981. He reported that none of the 15 grand juries that sat in this period had a black or female foreperson. Of the 15 deputy forepersons, three were black and six were female (J.A. 85-87). Based upon the census statistics, O'Reilly concluded (J.A. 86-88) that black persons and women were underrepresented among grand jury forepersons and deputy forepersons (see page 5 note 3, *supra*). He did not, however, have any information as to the race or gender composition of the grand jury that actually indicted petitioner (J.A. 104), nor did he

³ O'Reilly testified that, according to the census, 30% of the district population was black in 1970, whereas in his sample 20% of the jurors were black in 1977 (J.A. 70-71). Apparently he regarded the census population as evenly divided between males and females (see J.A. 88).

have analogous information with respect to any other actual grand jury that sat in the Eastern District of North Carolina during the period for which the identity of forepersons was examined (J.A. 105).

Petitioner argued (I C.A. App. 205-207) that he had established the elements of a *prima facie* case as outlined in *Rose v. Mitchell*, 443 U.S. 545 (1979), thereby requiring the government to rebut an inference that the cause of low representation of blacks and women as officers of the grand jury was intentional discrimination by the judges of the United States District Court for the Eastern District of North Carolina in their selection of forepersons and deputy forepersons.⁴ Petitioner also argued that the statistical evidence showed substantial underrepresentation of various population groups on the master jury list itself, and that the jury list accordingly did not reflect a "fair cross section of the community" (I C.A. App. 207-208).

In response, the government argued that the juror selection method employed in the Eastern District of North Carolina is consistent with the provisions of the Jury Selection and Service Act of 1968, and that there had been no showing that the selection procedures employed systematically excluded any class of persons eligible for service (I C.A. App. 208-209). The government also observed that there had been no showing that any group was underrepresented on the grand juries actually selected during the period 1974-1981, and that there had been no evidence as to the make-up of the grand jury that had indicted petitioner (*ibid.*). The government concluded that petitioner had not made a showing of purposeful discrimination in the selection of forepersons

⁴ In the district court, petitioner did not explicitly identify the constitutional basis for his claim of foreperson discrimination. But his citation of *Rose v. Mitchell*, and his effort to bring this case within the scheme allocating the intermediate evidentiary burdens applied there, indicates that the nature of the claim was intentional discrimination in violation of equal protection principles, applicable under the Due Process Clause of the Fifth Amendment.

or of the entire grand jury panel (*id.* at 210). The government did not put on any rebuttal evidence of its own.

Focusing on the challenge to procedures for selection of the grand jury as a whole, the district court denied petitioner's motion to dismiss (J.A. 110-113). The Court relied primarily upon *United States v. Coats*, 611 F.2d 37 (4th Cir. 1979), which upheld the jury selection plan of the Eastern District of North Carolina against a challenge based upon much the same evidence as was adduced here (see J.A. 59-60, 64-66, 101). The court did not believe that petitioner's added claim of discrimination in the selection of forepersons called for a different result (*id.* at 113).

b. The court of appeals affirmed the convictions of petitioner and his co-defendant. Petitioner had identified 14 issues on appeal and his brief encompassed numerous additional issues under these headings. The court of appeals determined, however, that "[m]ost of the contentions"—including petitioner's claim that he had been the victim of impermissible selective prosecution—"are of little substance or frivolous," and accordingly limited its discussion to two points (Pet. App. A8).⁵ First, the court discussed and rejected petitioner's contention that he had been prejudiced by the district court's correction of an error it had made in preliminary instructions concerning the elements to be proven by the government in order to establish a violation of 18 U.S.C. 665 (Pet. App. A8-A13).

Second, the court of appeals upheld the denial of petitioner's motion to dismiss the indictment based upon alleged discrimination against blacks and women in selection of federal grand jury forepersons in the Eastern District of North Carolina (Pet. App. A13-A19).⁶ The

⁵ This Court limited the grant of certiorari to the third question presented by the petition, declining to consider, *inter alia*, petitioner's selective prosecution claim (compare Pet. Br. 96-97).

⁶ On appeal petitioner and his co-defendant abandoned their challenge to the jury selection procedure used in the District and

court of appeals recognized (*id.* at A14-A15) that, in *Rose v. Mitchell*, 443 U.S. 545, 551 n.4 (1979), this Court had reserved the issue whether discrimination affecting only the selection of grand jury forepersons requires reversal of a conviction upon the resulting indictment. The court of appeals observed that, in contrast to the Tennessee scheme at issue in *Rose*, federal grand jury forepersons are chosen from among the members of the grand jury itself, and their duties are purely ministerial and provide them with no special influence over the rest of the grand jury (Pet. App. A16-A17). The court explained (*id.* at A17-A18):

The impact of the federal grand jury foreman, as distinguished from that of any other grand juror, upon the criminal justice system and the rights of persons charged with crime is minimal and incidental at best. Any suspicion that his office may enlarge his capacity to influence other grand jurors is too vague and uncertain to warrant dismissal of indictments and reversals of convictions.

Accordingly, although cognizant of the contrary decision of the Eleventh Circuit in *United States v. Perez-Hernandez*, 672 F.2d 1380 (1982), the court concluded that the "role [of a federal grand jury foreperson] is so little different from that of any other grand juror that the rights of defendants are adequately protected by assurance that the composition of the grand jury as a whole cannot be the product of discriminatory selection" (Pet. App. A18).

the constitution of the grand jury taken as a whole (Pet. App. A14). The district court's ruling respecting discrimination in foreperson selection was challenged in the brief of petitioner's black co-defendant, Levi, on an equal protection theory (Levi C.A. Br. 8-15). In that brief it was also argued (at 15) that petitioner had standing to press the equal protection claim as well. That assertion was supported only by citation of cases presenting Sixth Amendment fair cross section claims (*Duren v. Missouri*, 439 U.S. 357 (1979) and *Taylor v. Louisiana*, 419 U.S. 522 (1975)) or due process claims (*Peters v. Kiff*, 407 U.S. 493 (1972)) (Levi C.A. Br. 15). Petitioner simply adopted his co-defendant's argument on this point (Pet. C.A. Br. 45).

SUMMARY OF ARGUMENT

The issue in this case is not whether discrimination against blacks or women in the selection of grand jury forepersons is lawful, for there is no dispute between the parties that it is not. Rather, the question is whether the remedy of dismissal of a valid indictment returned by a grand jury properly drawn from a fair cross section of the community must be extended to a white male defendant who cannot show that he has suffered any specific injury from the alleged discrimination.

A. 1. The Court has long held that a black defendant cannot be validly indicted by a grand jury or convicted by a petit jury from which blacks have been purposefully excluded, because such official discrimination brands black persons as inferior in the eyes of the law and therefore may prevent even-handed administration of justice to black defendants. But petitioner, a white male, cannot claim any injury of this kind flowing from the discrimination he alleges to exist against blacks and women. He accordingly has no standing to challenge his indictment on equal protection grounds.

2. In *Peters v. Kiff*, 407 U.S. 493 (1972), the Court accorded standing to a white defendant to seek dismissal of an indictment based upon discriminatory exclusion of blacks from the grand jury that indicted him, reasoning that due process assures a defendant a jury drawn from the full range of groups represented in the community population (opinion of Marshall, J.) and that exclusion of a racial group from jury service is a violation of 18 U.S.C. 243 (opinion of White, J.). But no violation of 18 U.S.C. 243 could be alleged here, and it is difficult to see how designation as foreperson of one grand juror from among a grand jury drawn in a representative fashion could disable it from exercising its independent judgment or destroy its broad-based character. Moreover, the single foreperson of a grand jury is not required to—and obviously could not—serve as a representative of all tendencies within the community. An allegation of discrimination in foreperson selection accordingly does

not implicate the rights of a defendant to a grand jury properly drawn from the community.

Nor—assuming petitioner has standing to press such a contention—must the remedy of dismissal be made available here to guard against any debilitating effect of official tolerance of discrimination upon the grand jury's ability to administer justice impartially. Discrimination limited to the selection of a single foreperson from among the members of a properly constituted grand jury casts no shadow of prejudice within the jury room because, absent other indicia of discrimination, its operation would not be apparent to the grand jurors.

3. Petitioner quarrels with the court of appeals' characterization of the role of foreperson as a "ministerial" one. Even if one accepts petitioner's description of the foreperson's job, however, the role is essentially administrative and clerical. The key fact is that a foreperson lacks any authority to determine whether a prosecution will go forward or not that is independent of that of the grand jury upon which he sits and casts a single vote. In any event, petitioner's argument is misconceived, for the issue in this setting is not, as petitioner appears to assume, whether the job of foreperson is an important one in some abstract sense, or significant enough to make discrimination in foreperson selection cognizable by the courts when a member of an allegedly excluded class seeks to redress such discrimination. Distinctive interests of criminal defendants have been held to permit them to challenge discrimination in selection of the grand jury as a whole. Measured in terms of those interests, however, the role of the foreperson lacks any attribute that would justify dismissal of an indictment based on the selection of one individual or another to serve in that capacity.

B. 1. The rule petitioner advocates would place substantial and unjustifiable burdens upon the administration of justice. It is petitioner's submission that by demonstrating historical underrepresentation of blacks or women among grand jury forepersons in the judicial dis-

trict in which he was indicted he has cast upon the "government" the burden of demonstrating that this pattern is not due to purposeful discrimination by the judges of the district court. But because the selection of a foreperson is entrusted by law to the discretion of the district judge who supervised and impanelled the grand jury, no practical means of rebutting a statistically-based inference of discrimination exists except to adduce the testimony of the district judges or judge responsible for selection. This procedure has been employed within the Eleventh Circuit pursuant to the decisions of that court. It has placed a substantial burden upon the administration of justice, wholly unjustified by any injury suffered by defendants.

2. The remedy of dismissal of an indictment need not be extended to a criminal defendant in order vicariously to protect the rights of would-be forepersons or to protect the integrity of the judicial system. Other, more appropriate means are available to fulfill those purposes. The Judicial Councils established pursuant to 28 U.S.C. (& Supp. V) 332 have jurisdiction to investigate impediments to the administration of justice within their respective circuits, including those attributable to the conduct of judicial officers, and have the power to issue corrective orders binding upon the responsible judicial personnel. This procedure is available both to assure the integrity of the administration of justice and to assure that no class of persons need suffer discriminatory action by any district judge.

The Judicial Conference and its standing committees have similar investigatory capacity and have the authority to recommend any amendment to the Federal Rules of Criminal Procedure that is necessary to carry out the salutary policy of preventing discrimination in the administration of justice. Thus, if investigation should disclose a problem, the courts' supervisory responsibilities over the administration of justice may be most effectively carried out directly by requiring nondiscriminatory foreperson selection rather than indirectly by providing the

windfall of a dismissal to an uninjured defendant. Maintenance of a civil action by members of a discriminatorily excluded class likewise could afford relief without attendant cost to society. There accordingly is no warrant for permitting a wholly uninjured defendant such as petitioner to seek dismissal of the valid indictment returned against him.

ARGUMENT

A WHITE MALE DEFENDANT'S CLAIM OF DISCRIMINATION AGAINST BLACKS AND WOMEN THAT IS LIMITED TO THE SELECTION OF A FOREPERSON FROM AMONG THE MEMBERS OF A PROPERLY CONSTITUTED GRAND JURY PROVIDES NO BASIS FOR A MOTION TO DISMISS THE INDICTMENT

Based upon purely statistical evidence that black persons and women have historically been underrepresented among grand jury forepersons in the Eastern District of North Carolina, petitioner claims that foreperson selection in that district reflects a pattern of intentional discrimination. But the direct object of petitioner's claim is not to redress the alleged discrimination or to open the role of foreperson to black or female grand jurors that have allegedly suffered discriminatory consideration. Rather, based upon the proffered evidence petitioner seeks reversal of his conviction and dismissal of his indictment. Contrary to petitioner's characterization of the decision of the court of appeals (see Pet. Br. 14), and the overstated claim of an amicus curiae (ACLU Br. 1), neither the United States nor the court of appeals has "defended * * * reservation of a position exclusively for white males" in this case. Rather, the question that we have addressed is a variant of the remedial one that was reserved in *Rose v. Mitchell*, 443 U.S. 545, 551-552 n.4 (1979): whether, if proven, "discrimination with regard to the selection of only the foreman requires that a sub-

sequent conviction be set aside, just as if the discrimination * * * had tainted the selection of the entire grand jury venire." See pages 22-23 note 12, *infra*.

Our answer to this question is that dismissal of an indictment is unwarranted when a defendant's complaint is that there has been discrimination only in the exercise of the court's discretion as to which of the members of a properly selected grand jury, drawn at random from a fair cross section of the community, shall carry out the duties of the foreperson. Because such discrimination has a de minimis impact upon the rights of a criminal defendant, while the remedy proposed (and the procedural scheme by which it would be administered) would impose heavy burdens upon the administration of justice, and because less costly and more effective means of assuring equal consideration of all grand jurors for the role of foreperson appear to be available, nothing in this Court's teaching would justify affording the remedy of dismissal to a criminal defendant.

Petitioners and the amici search far and wide for a basis in the constitutional or other federal law expounded by this Court that would support the petitioner's claim for relief. Throughout the course of this litigation the doctrinal basis for petitioner's claim has been obscure. As indicated in our statement of the case (page 6 note 4 & page 8 note 6, *supra*), petitioner generally relied below upon equal protection principles and cases. He appeared, however, to invoke broader considerations of due process and representational values in the jury selection process in asserting his entitlement, as a white male, to complain of alleged discrimination against black persons and women. In this Court, at the petition stage, petitioner framed a broad "due process" claim (Pet. 32, 39), albeit relying primarily on *Rose v. Mitchell*, which addressed an equal protection claim.⁷

⁷ Because the guaranty against invidiously discriminatory official action by agencies of the United States has been located in the Fifth Amendment Due Process Clause, see *Bolling v. Sharpe*, 347

In his brief on the merits, petitioner still does not settle upon any doctrinal basis or constitutional foundation for his claim. Rather, petitioner merely surveys three lines of cases addressing aspects of selection of the jury as a whole: cases founded upon the Fourteenth Amendment Equal Protection Clause (Pet. Br. 51-62), cases decided under the Sixth Amendment fair cross section requirement and the Fourteenth Amendment Due Process Clause (Pet. Br. 62-70), and a triad of cases said to have been decided under this Court's supervisory power over the administration of justice in the lower federal courts (Pet. Br. 70-76). Petitioner does not specifically place reliance on any of these lines of authority. And there is not—and could not be—any suggestion that any of the cases cited addresses the question whether an indictment should be dismissed because of discrimination affecting only the selection of a foreperson from among the members of a properly constituted grand jury. Petitioner simply asserts (Pet. Br. 77) that “it follows” from his survey of the three lines of authority that the indictment in his case must be quashed. As we indicate below neither any of the lines of authority canvassed by petitioner viewed in isolation nor all of them read together support that assertion.

The same is true of the diverse arguments proffered by the amici curiae. The amici generally do not purport to support the arguments made by petitioner below or in this Court, and do not even endorse the rationale adopted by the Eleventh Circuit in its decisions contrary to the decision below.⁸ Rather, amicus ACLU advances a novel argument, which has allegedly “escaped the attention of the lower courts which have heretofore considered th[e] issue” (ACLU Br. 2) in this case. It is that discrimina-

U.S. 497, 499 (1954), petitioner's formulation is inherently ambiguous.

⁸ I.e., *United States v. Cross*, 708 F.2d 631 (1983), petition for cert. pending, No. 83-1037, and *United States v. Perez-Hernandez*, 672 F.2d 1380 (1982).

tion in the selection of a foreperson from among its members deprives a grand jury of its status as a "grand jury" satisfying the requirement of the indictment clause of the Fifth Amendment. And amicus curiae NAACP Legal Defense and Education Fund (LDEF) urges the Court to decide this case under the Jury Selection and Service Act of 1968. Yet, ACLU is obliged to acknowledge (Br. 18-19) that no authority supports conversion of a fair cross section requirement applicable to the list from which grand jurors are drawn to a requirement of proportional representation in the post of foreperson. And the LDEF acknowledges (Br. 15) that the Jury Selection and Service Act is not, on its face, applicable to foreperson selection at all. Thus, as is detailed below, none of the alternative contentions advanced by the amici carries petitioner over the hurdle that his own arguments fail to surmount: the absence of any sufficient justification for dismissing the indictment of a criminal defendant held to answer by a properly constituted grand jury.

A. Equal Protection and Due Process Principles Do not Require Dismissal of an Indictment Based Upon Discrimination Extending Only to the Selection of a Foreperson From Among the Members of a Properly Constituted Grand Jury

1. a. This Court "has long recognized that 'it is a denial of the equal protection of the laws to try a defendant of a particular race or color under an indictment issued by a grand jury . . . from which all persons of his race or color have, solely because of that race or color, been excluded * * *.'" *Castaneda v. Partida*, 430 U.S. 482, 492 (1977) (quoting *Hernandez v. Texas*, 347 U.S. 475, 477 (1954)). And while this principle was originally applied to "absolute exclusion of an identifiable group" it subsequently was enlarged to recognize that "substantial underrepresentation of the group constitutes a constitutional violation as well, if it results from purposeful discrimination." *Castaneda v. Partida*, 430 U.S. at 493.

The rationale for the Court's recognition of a defendant's right to dismissal of an indictment returned by a grand jury from which members of his or her own race have been excluded by intentional discrimination was stated in the earliest decision applying that principle as it emerged in the petit jury context (*Strauder v. West Virginia*, 100 U.S. 303, 308 (1879) (emphasis added)):

The very fact that colored people are singled out and expressly denied by a statute all right to participate in the administration of the law, as jurors, because of their color, though they are citizens, and may be in other respects fully qualified, *is practically a brand upon them, affixed by the law, an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others.*

Because the "exclusion from grand jury service of Negroes, or any group otherwise qualified to serve" is especially odious, "destroys the appearance of justice," "casts doubt upon the integrity of the judicial process," and thereby "impairs the confidence of the public in the administration of justice," the Court has held that a "criminal defendant's right to equal protection of the laws has been denied when he is indicted by a grand jury from which members of a racial group purposefully have been excluded" (*Rose v. Mitchell*, 443 U.S. at 555-556). It has therefore "reversed the conviction and ordered the indictment quashed in such cases without inquiry into whether the defendant was prejudiced in fact by the discrimination at the grand jury stage" (*id.* at 556).

b. By their own terms, this Court's decisions under the Equal Protection Clause of the Fourteenth Amendment requiring dismissal of an indictment that is the product of a grand jury constituted through intentional discrimination have no application here. As petitioner appears to concede (Br. 62), as a white male he lacks standing to complain of discrimination against women and black persons in the selection of forepersons. The

Court has consistently held—from *Strauder* through *Rose v. Mitchell*, 443 U.S. at 555—that the injury that supports an equal protection attack upon an indictment is the “brand” upon the excluded group, the “assertion of their inferiority,” that is thought to stimulate “race prejudice which is an impediment to securing to individuals of the [excluded] race . . . equal justice” (*Strauder v. West Virginia*, 100 U.S. at 308. Obviously, petitioner, a white male, has suffered no such injury, even if it is assumed that the alleged discrimination against women and blacks could have the corrosive impact described in *Strauder* when limited to the selection of a foreperson. Petitioner does not and cannot allege that *he* has suffered any injury resulting from any stigma that might have been planted in the minds of the jury, that *he* has been branded as inferior, or that *he* has been exposed to adverse racial prejudice that in any way diminished the prospects for impartial and dispassionate consideration of his case by the grand jury.

This Court has repeatedly characterized an equal protection claim founded upon alleged discrimination against an identifiable group in jury selection in terms that suggest that the injury to be redressed does not extend to persons who are not members of the class allegedly subjected to discrimination. For instance, in *Castaneda v. Partida* the Court summarized its teaching (430 U.S. at 492 (quoting *Hernandez v. Texas*, 347 U.S. 475, 477 (1954) (emphasis added))):

This Court has long recognized that “it is a denial of equal protection of the laws to try *a defendant of a particular race or color* under an indictment issued by a grand jury . . . from which all persons of *his race or color* have, solely because of that race or color, been excluded . . .”

And the Court reiterated in *Rose v. Mitchell* that “in order to show that an equal protection violation has occurred in the context of grand jury [foreman] selection, the defendant must show that the procedure employed resulted in *substantial underrepresentation of his race or*

of the identifiable group to which he belongs' " (443 U.S. at 565 (emphasis added; quoting *Castaneda v. Partida*, 430 U.S. at 494)).

Similarly, in *Alexander v. Louisiana*, 405 U.S. 625 (1972), the Court declined to entertain a claim that a male defendant had been denied equal protection of the laws by Louisiana's exemption from jury duty of women who do not volunteer for service, strongly suggesting that the defendant lacked standing to press the claim (405 U.S. at 633):

This claim is novel in this Court and, when urged by a male, finds no support in our past cases. The strong constitutional and statutory policy against racial discrimination has permitted Negro defendants in criminal cases to challenge the systematic exclusion of Negroes from the grand juries that indicted them. Also, those groups arbitrarily excluded from grand or petit jury service are themselves afforded an appropriate remedy. Cf. *Carter v. Jury Commission*, [396 U.S. 320 (1970)]. But there is nothing in past adjudications suggesting that petitioner himself has been denied equal protection by the alleged exclusion of women from grand jury service.^[9]

⁹ The Court ultimately rested its decision in this branch of *Alexander* upon its practice of eschewing decision of constitutional issues where avoidable, observing that the conviction challenged there had been reversed on other grounds, and that the sex discrimination issue might become moot (405 U.S. at 633-634). But the Court's skeptical appraisal of the defendant's standing to raise an equal protection claim is nonetheless telling.

Contrary to the assertion of amicus LDEF (Br. 8 n.4), that appraisal did not rest upon the Court's recognition that the Fifth Amendment's requirement of indictment by a grand jury does not apply to the states. In the discussion quoted in the text the Court addressed the defendant's equal protection claim. In the language that followed to which LDEF points, the Court also observed that because the Fifth Amendment Grand Jury Clause is not applicable to the states under the Fourteenth Amendment, "federal concepts of a 'grand jury'" (405 U.S. at 633) established thereunder are inapplicable in state cases. But the Court's comment that the Grand Jury Clause—and any requirements it holds as to the constitution of

In sum, to accord the petitioner standing to raise an equal protection claim would be inconsistent with the gravamen of such a claim and the reasons for dispensing with a requirement that a black defendant show that he was specifically prejudiced by discrimination against blacks in the constitution of the grand jury or petit jury. In declining to extend standing to seek dismissal of an indictment to a nonmember of the class that had allegedly suffered discrimination the Fifth Circuit has recently observed (*United States v. Cronn*, 717 F.2d 164, 169 (1983), petition for cert. pending, No. 83-979) :

The essence of an equal protection claim is that other persons similarly situated as is the claimant unfairly enjoy benefits that he does not or escape burdens to which he is subjected. * * * Equal protection claims are of their nature personal, to be stated in terms of one's own rights or those of a class in which one claims membership; logically [a defendant] lacks standing to complain of unequal treatment accorded other persons or classes of which he is not a member.

Accord: *United States v. Coletta*, 682 F.2d 820, 824 (9th Cir. 1982), cert. denied, No. 82-798 (Feb. 22, 1983).¹⁰ Moreover, as the Fifth Circuit has also observed (*United*

the grand jury (see pages 35-37, *infra*)—had no application should not obscure its separate discussion of the inapplicability of equal protection principles. As the Court reiterated in *Rose v. Mitchell*, 443 U.S. at 557 n.7, states that *do* employ grand juries are not relieved from the operation of the Fourteenth Amendment Equal Protection Clause. See also *Peters v. Kiff*, 407 U.S. 493, 496, 501 (1972) (opinion of Marshall, J.).

¹⁰ As explained in our Brief in Opposition in *Cronn*, the Eleventh Circuit, which has permitted nonmembers of a class allegedly suffering discrimination in grand jury foreperson selection to raise an equal protection claim, see *United States v. Cross*, 708 F.2d 631, 633-634 (1983), petition for cert. pending, No. 83-1037; *United States v. Perez-Hernandez*, 672 F.2d 1380 (1982), has failed to observe the distinction for purposes of standing between the due process and equal protection challenges to an indictment established in *Peters v. Kiff*. (A copy of our Brief in Opposition in *Cronn* has been provided to petitioner.)

States v. Cronn, 717 F.2d at 169-170), there is no special relationship or nexus between a defendant such as petitioner and the black or female grand jurors allegedly suffering discrimination in foreperson selection that might justify allowing that defendant vicariously to assert their rights.¹¹ Thus, denial of standing to petitioner to raise an equal protection claim is required by this Court's decisions that a party ordinarily may not assert the constitutional rights of strangers, see, e.g., *Warth v. Seldin*, 422 U.S. 490, 499 (1975); *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973)—a principle that applies to criminal defendants no less than other litigants. See *United States v. Salvucci*, 448 U.S. 83, 86-87 (1980); *Rakas v. Illinois*, 439 U.S. 128, 133-134 (1978); *Brown v. United States*, 411 U.S. 223, 230 (1973); *Alderman v. United States*, 394 U.S. 165, 174 (1969).

2. Even if petitioner had standing to complain of discrimination in the selection of grand jury forepersons from among the members of a properly constituted grand jury, he would not be entitled to reversal of his conviction and dismissal of the indictment. As petitioner observes (Br. 63-65), *Peters v. Kiff*, 407 U.S. 493 (1972), held that a white defendant had standing to seek reversal of his conviction and dismissal of his indictment on the ground that black persons "were systematically excluded from the grand jury that indicted him and the petit jury that convicted him" (407 U.S. at 494 (opinion of Marshall, J.)). But close examination of *Peters* suggests that petitioner cannot prevail upon his claim lim-

¹¹ Contrary to the assertion of the LDEF (Br. 14 n.7), this case is in no respect analogous to *Barrows v. Jackson*, 346 U.S. 249 (1953), in which the Court permitted a white person being sued for damages for breach of a racial restrictive covenant to assert that enforcement of the covenant would deny equal protection of the laws to nonwhite would-be purchasers. The Court emphasized that its ruling was limited to the "unique situation" and "peculiar circumstances" of the particular case and depended upon the practical inability of persons whose rights were asserted to protect them directly in litigation (346 U.S. at 257). See *United States v. Cronn*, 717 F.2d at 169.

ited, as it is, to discrimination in the selection of a grand jury foreperson.

a. *Peters* was decided without an opinion for the Court. Justice Marshall, joined by Justices Douglas and Stewart, reasoned that any criminal defendant "has standing to challenge the system used to select his grand or petit jury, on the ground that it arbitrarily excludes from service the members of any race, and thereby denies him due process of law" (407 U.S. at 504). Justice Marshall stated that exclusion of persons from jury service on the basis of their race "cast doubt on the integrity of the whole judicial process" (*id.* at 502) and therefore implicates the right of every defendant to a competent tribunal (*id.* at 501-502). Justice Marshall reasoned (*id.* at 503-504 (footnote omitted)) that exclusion of

any large and identifiable segment of the community * * * from jury service * * * remove[s] from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable. It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude, as we do, that its exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented.

To underscore the nature of the injury to a white defendant's rights perceived in the exclusion of black persons from jury service, Justice Marshall quoted (407 U.S. at 504 n.12) from *Ballard v. United States*, 329 U.S. 187, 193-194 (1946) (footnote omitted), in which the Court reversed the conviction of a female defendant convicted and indicted by juries from which women had been systematically and intentionally excluded:

"The truth is that the two sexes are not fungible; a community made up exclusively of one is different from a community composed of both; the subtle interplay of influence one on the other is among the imponderables. To insulate the courtroom from either may not in a given case make an iota of differ-

ence. *Yet a flavor, a distinct quality is lost if either sex is excluded.*" [Emphasis added.]

Justice White, joined by Justices Brennan and Powell, concurred in the Court's judgment in *Peters v. Kiff* without joining Justice Marshall's opinion. Pointing to 18 U.S.C. 243, which provides that no otherwise qualified citizen "shall be disqualified for service as grand or petit juror" in any state or federal court "on account of race, color or previous condition of servitude," these Justices reasoned that "Congress [had] put cases involving exclusions from jury service on grounds of race in a class by themselves" (407 U.S. at 505-506). Standing was to be extended to a white defendant, in Justice White's view, to "implement the strong statutory policy of [18 U.S.C.] 243" (*id.* at 507).

b. Neither the concerns that led the Court to extend standing to challenge exclusion of black citizens from jury service to white defendants in *Peters*, nor the considerations that have led the Court in the equal protection jury selection cases to direct dismissal of indictments without regard to specific prejudice to the individual defendant, are significantly implicated in the very different setting of a challenge to the selection of a federal grand jury foreperson.

Under the law of some states, grand jury forepersons are selected by a process separate from that used in impaneling the grand jury, and then tacked on to the membership of that body. See, *e.g.*, *Rose v. Mitchell*, 443 U.S. at 548 n.2. Under Fed. R. Crim. P. 6(c) the federal grand jury foreperson, by contrast, is simply selected by the court from among the members of the grand jury. Accordingly, any discrimination in selection does not at all affect the overall composition of the grand jury.¹²

¹² The question presented here therefore differs in an important respect from that reserved in *Rose v. Mitchell*, 443 U.S. at 551-552 n.4. In the Tennessee system considered there, the foreperson was selected separately from the other 12 members of the grand jury (*id.* at 548 n.2). In holding that discrimination affecting only the selection of the foreperson impairs the validity of an indictment,

A federal grand jury is itself required by statute to be drawn "at random from a fair cross section of the community in the district or division wherein the court convenes" (28 U.S.C. 1861). This must be done by a process that tolerates no exclusion from service "on account of race, color, religion, sex, national origin, or economic status" (28 U.S.C. (Supp. V) 1862), and pursuant to a written plan that the Circuit Judicial Council has determined to conform with these requirements and the additional criteria of 28 U.S.C. (& Supp. V) 1863(b) (28 U.S.C. 1863(a)). It would be unrealistic, therefore, to suggest that, in the absence of any overt manifestation of prejudice, the mere designation of one of the grand jury's members as foreperson (an inevitable occurrence) could "cast doubt upon the integrity of the whole judicial process" (*Peters v. Kiff*, 407 U.S. at 502 (opinion of Marshall, J.)) or would "impair[] the confidence of the public in the administration of justice" (*Rose v. Mitchell*, 443 U.S. at 556).

In addition, because the federal grand jury foreperson is simply selected from among his or her peers, the concern voiced in Justice Marshall's opinion in *Peters* for the narrowing of the range of experience and perspective that occurs when "any large and identifiable segment of the community is excluded from jury service" (407 U.S. at 503) does not arise when the alleged discrimination pertains to the selection of a foreperson from

the court of appeals had observed that "the foreman or forewoman is a full member of the grand jury" and had reasoned that "a grand jury which is only twelve-thirteenth's constitutional cannot render constitutionally valid indictments." *Mitchell v. Rose*, 570 F.2d 129, 136 (6th Cir. 1978). The court of appeals distinguished (*id.* at 136) its prior decision in *Hale v. Henderson*, 485 F.2d 266, 269-270 (6th Cir. 1973), cert. denied, 415 U.S. 930 (1974), in which it had rejected a defendant's challenge to selection of the foreperson from among the members of a properly constituted grand jury. See also 485 F.2d at 272 (Lambros, J., concurring). This case, of course, resembles *Hale v. Henderson* rather than *Mitchell v. Rose*. Accordingly, we need not and do not argue here that a de minimis exception should be recognized to the rule of *Peters v. Kiff* that governs challenges to the constitution of the grand jury itself.

among the members of a properly constituted federal grand jury.¹³ Because the single individual designated as foreperson necessarily cannot embody the full range of "human nature and varieties of human experience" (*ibid.*), and because substantial safeguards do assure that the constitution of the federal grand jury as a whole serves the purposes highlighted in *Peters*, a challenge to foreperson selection does not implicate the due process rights of a criminal defendant. See *United States v. Coletta*, 682 F.2d at 824.¹⁴

It seems to be petitioner's assumption that the foreperson selection decision should be regarded as analogous to the selection of a grand jury, only in microcosm, and should trigger precisely the same procedural rights for criminal defendants as are associated with grand jury selection. But this Court has never embraced that course of analysis. Rather, in applying the Sixth Amendment jury trial guaranty, for instance, the court has emphasized that the fair cross section principle deduced from the Sixth Amendment is not to be extended to the "microcosm" (*Taylor v. Louisiana*, 419 U.S. 522, 538 (1975)):

It should also be emphasized that in holding that petit juries must be drawn from a source fairly

¹³ Because the selection process for a grand jury, unlike that for a petit jury, does not allow for the exercise of peremptory challenges, compare Fed. R. Crim. P. 6(b) (providing that the grand jury array may be challenged for improper selection procedure and that individuals may be challenged as not legally qualified) with Fed. R. Crim. P. 24(b) (peremptory challenges to petit jurors), the selection of grand jurors by the statutorily prescribed mechanism is particularly effective in ensuring that the representational due process values underlying the decision in *Peters v. Kiff* are vindicated. Compare *Swain v. Alabama*, 380 U.S. 202, 223-224, 226 (1965); see *id.* at 228-231 (Goldberg, J., dissenting).

¹⁴ Nor is it claimed that discrimination in the selection of a federal grand jury foreperson from among grand jury members violates 18 U.S.C. 243. Accordingly, challenges to foreperson selection lie outside the exceptional class of cases recognized by Justices White, Brennan and Powell in *Peters* (407 U.S. at 505-506).

representative of the community we impose no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population. Defendants are not entitled to a jury of any particular composition, *Fay v. New York*, 332 U.S. 261, 284 (1947); *Apodaca v. Oregon*, 406 U.S., at 413 (plurality opinion); but the jury wheels, pools of names, panels, or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof.

Accord: *Duren v. Missouri*, 439 U.S. 357, 363-364 & n.20 (1979). See also *id.* at 371-373 n.* (Rehnquist, J., dissenting); compare *Swain v. Alabama*, 380 U.S. 202, 221-222 (1965), with *id.* at 222-224. So, too, here. The principle underlying *Peters v. Kiff* should not be mechanically extended to reach situations in which the considerations that inform that decision have no application.

c. At bottom, the claim that discrimination limited to the designation of a foreperson from among his or her fellow grand jurors requires the dismissal of an indictment should fail because the core concerns expressed in *Strauder v. West Virginia* and its progeny as to the debilitating effect of discrimination in jury selection upon the jury's ability to administer justice impartially are present, if at all, only in the most attenuated form here. The grand jury has only one foreperson. The members of the grand jury are required to be chosen at random from a fair cross-section of the community. In these circumstances the identity of the foreperson of any given grand jury could not suggest to its members any official tolerance for a rule of unequal justice.

De jure exclusion of blacks from all jury participation such as was at issue in *Strauder*, or the substantial underrepresentation of minority group members considered in subsequent equal protection decisions, flaunts discrimination in a manner that may well affect the jury's perceptions, affixing a "brand" of "inferiority" upon persons of the disfavored group so as to foster less than impartial consideration of grand jury targets belonging to such

groups. But the grand jury typically operates out of the public eye. Cf. Fed. R. Crim. P. 6(e) (2). And there is no reason to believe—and petitioner does not claim—that the identity and race or gender characteristics of the forepersons of various grand juries over time are matters generally known to the public—or to the members of a given grand jury. Accordingly, it is not at all apparent how discrimination limited to the selection of the foreperson from among a grand jury drawn from a representative sampling of the community could become manifest at all, let alone sufficiently notorious to stigmatize minority defendants and thereby justify a presumption that the integrity of the grand jury has been destroyed. Thus there is no basis in this situation for dismissing an indictment returned by a validly constituted grand jury, absent a showing of actual prejudice to the defendant.

A different result might be warranted if a black or female defendant could show an open and notorious practice by the supervising court of disqualifying black or female grand jurors for service in the impanelment process, or explicitly excluding black or female grand jurors from consideration as forepersons, by reason of their race or sex, or a similar pattern of action by the court that creates a factual predicate for applying the stigma analysis of *Strauder*. Petitioner does not claim that any such evidence of discrimination exists in this case, and the record does not support any such claim.

d. We recognize, of course, that in *Rose v. Mitchell*, 443 U.S. at 551-559, the Court rejected the view, espoused there by Justice Stewart joined by Justice Rehnquist (*id.* at 574-579), that a defendant's conviction by a properly constituted petit jury bars any challenge to the indictment on the ground that the grand jury was improperly constituted. The argument advanced here is not inconsistent with that holding.¹⁵ The Court concluded in

¹⁵ We do not here press the argument rejected by the Court in *Rose*. We note that this case arises on direct appeal from the de-

Rose, 443 U.S. at 554-559, that because the constitutional policy against racial discrimination is especially strong, and because discrimination in jury selection operates as a brand of inferiority that undermines the impartial administration of justice, the remedy of reversal of a conviction and dismissal of an indictment should remain available as a means of vindicating Fourteenth Amendment rights. But, as we have explained, the due process and equal protection rights of defendants simply are not significantly implicated when discrimination only in the selection of a foreperson from among the members of a grand jury drawn from a fair cross section of the community is alleged. And as we explain below (pages 40-50), the costs associated with the remedy petitioner seeks are substantially greater than those associated with challenges to the constitution of the grand jury as a whole, and alternative remedies sufficient to protect the equal protection rights of all persons to serve as grand jury forepersons are available.

In any event, the remedial issue presented here is not analogous to that considered in *Rose v. Mitchell*. Before a defendant may be tried upon a criminal charge he must be accused. Accusation thus plays a critical role in the prosecution process; without it no conviction would be possible. Accordingly, even though the states are not constitutionally required to proceed by indictment (see *Rose v. Mitchell*, 443 U.S. at 575 n.2 (Stewart, J., concurring)), defendants are entitled to insist that "those States that do employ grand juries * * * comply[] with the commands of the Fourteenth Amendment in the operation of those juries" (*Rose v. Mitchell*, 443 U.S. at 557 n.7). But the foreperson of the grand jury has no separate role in the course of the prosecution comparable to that of the grand jury as a whole. His concurrence is not even necessary to the validity of an indict-

ment's conviction, rather than upon collateral review, and that the prosecution was constitutionally required to proceed by indictment in this federal case. Compare *Rose v. Mitchell*, 443 U.S. at 575 & n.2 (Stewart, J., concurring).

ment. *Frisbie v. United States*, 157 U.S. 160, 163-165 (1895); Fed. R. Crim. P. 6(c) advisory committee note 18 U.S.C. App. at 568. And the foreperson's actions and responsibilities are carried out entirely in the context of the operation of the grand jury. He has no authority apart from that of the grand jury as a whole to act in a manner that determines or influences whether a defendant is to be prosecuted. Thus there is no analogy to be drawn between the relationship of the foreperson to the grand jury and that of the grand jury to the trial jury. In sum, nothing in *Rose v. Mitchell* suggests that scrutiny of the selection of forepersons from among the grand jury's members at the behest of a criminal defendant, separate and apart from any challenge to the constitution of the grand jury as a whole, is necessary to preserve any right of the defendant.

3. Rather than addressing the policies of *Peters v. Kiff* and *Rose v. Mitchell*, petitioner's argument that a defendant must be permitted to challenge his indictment by alleging discrimination limited to the selection of a foreperson from among the members of a federal grand jury is wholly divorced from any analysis of this Court's decisions. Compare Pet. Br. 22-46 with *id.* at 47-77. Petitioner's argument is narrowly gauged to dispute the court of appeals' statement (Pet. App. A17) that the duties of a federal grand jury foreperson are "ministerial." Relying upon the tasks assigned to the foreperson according to the Judicial Conference's *Handbook for Federal Grand Juries*, the testimony of federal judges in other cases as to their criteria for selecting forepersons, and the views of certain "social psychiatrists" as to the nature of authority and interpersonal influence in group processes, petitioner argues that the foreperson of a federal grand jury is vested with such "singular power and authority" (Pet. Br. 22) that defendants should be permitted to challenge an indictment by alleging discrimination limited to the selection of the foreperson. Petitioner's characterization of the role of the foreperson is considerably overdrawn. More to the point, however, petitioner's quarrel

with the court of appeals' assessment of the grand jury foreperson's role does not disclose any attribute of that role that implicates the policies underlying the Court's decisions addressing discrimination in the selection of a grand jury or petit jury.

Unlike the grand jury itself, an institution the operation of which is required by the Fifth Amendment, the office of the foreperson is not a creature of the Constitution or any federal statute. Rather, it is a traditional office, which long existed without any statutory foundation,¹⁶ that is currently reflected in the Federal Rules of Criminal Procedure. Fed. R. Crim. P. 6(c) provides, in its entirety:

The court shall appoint one of the jurors to be foreman and another to be deputy foreman. The foreman shall have power to administer oaths and affirmations and shall sign all indictments. He or another juror designated by him shall keep a record of the number of jurors concurring in the finding of every indictment and shall file the record with the clerk of the court, but the record shall not be made public except on order of the court. During the absence of the foreman, the deputy foreman shall act as foreman.

These duties—administering of oaths, keeping of records, and attesting to the formal validity of documents—are essentially those of a clerk. The office of foreperson effectively provides the grand jury with a clerical official without jeopardizing the confidentiality of grand jury proceedings. The explanatory notes of the Advisory Committee on Rules that accompany Rule 6(c) do not suggest any broader role for the foreperson. Rather, they simply state that (with the exception of the creation of the position of deputy foreman, an innovation under the rules)

¹⁶ Describing federal grand jury practice prior to the adoption of the Federal Rules of Criminal Procedure, Professor Orfield stated (*The Federal Grand Jury*, 22 F.R.D. 343, 377 (1959)): "Even though there is no statute so providing the trial court may appoint a foreman."

the Rules merely continued pre-existing practices. 18 U.S.C. App. at 568. The only specific indication of the authority of the foreman is negative: consistent with *Frisbie v. United States*, 157 U.S. at 163-165, it is noted that "[f]ailure of the foreman to sign or endorse the indictment is an irregularity and is not fatal" to the effectiveness of the indictment. 18 U.S.C. App. at 568. Accordingly, the court of appeals' characterization of the foreperson's duties as ministerial is accurate. Accord: *United States v. Aimone*, 715 F.2d 822, 827 (3d Cir. 1983), petitions for cert. pending *sub nom. Dentic v. United States*, No. 83-681 and *Musto v. United States*, No. 83-690.

Nor do the additional duties of the grand jury foreperson reflected in the Judicial Conference's model *Handbook For Federal Grand Juries* (see Pet. Br. 24-28) or in the Eleventh Circuit's opinion in *United States v. Cross*, 708 F.2d 631, 637 (1983), petition for cert. pending, No. 83-1037 (see Pet. Br. 29-30), even if actually performed in a given district,¹⁷ materially alter this assessment. Most of these duties are purely administrative or clerical: excusing the attendance of a grand juror from a scheduled session in an emergency, determining the need for an interpreter, signaling the commencement of deliberations when all testimony and evidence have been received and all witnesses and agents of the grand jury have left the room, reporting the actions of the grand jury as necessary to the court, collecting notes so as to preserve the security of the grand jury proceedings, and maintaining order in the grand jury. In other instances, the

¹⁷ Petitioner does not assert, and the record does not reflect, the use of this *Handbook* or the Model Grand Jury Charge in the Eastern District of North Carolina, and it is clear that the use of the *Handbook* is not uniform throughout the federal court system. See Brief for the United States at 6, *Dentic v. United States*, No. 83-681, etc. (A copy of the cited brief has been provided to petitioner.) And the opinion of the Third Circuit in *Aimone* explicitly indicates, 715 F.2d at 827, that the duties of forepersons in the District of New Jersey are more limited than those outlined in *United States v. Cross*.

foreperson may act as a conduit for exchange of information between the prosecutor and the grand jury or may be consulted by the prosecutor to determine the grand jury's disposition regarding issuance of a subpoena. But there is no evidence or other reason to believe that in these matters the foreperson acts on his or her own, rather than as the instrument and agent of the grand jury. Cf. *Breese v. United States*, 226 U.S. 1, 10 (1912). Petitioner also observes that the foreperson typically is the first of the grand jurors to question grand jury witnesses after the prosecutor has completed his examination. But whatever status may attach to the foreperson as a result of this custom, it is scarcely sufficient to elevate the foreperson, vested by law with no more than the single vote accorded his or her colleagues in determining whether to return an indictment, to an independent position of authority to govern the rights of a defendant.¹⁸

In any event, petitioner's argument that the foreperson has relatively significant duties and status is simply misdirected. The question is not, after all, whether the position of foreperson is in some abstract sense "con-

¹⁸ If, contrary to the rule of *Frisbie*, a foreperson's signature (and thus his concurrence) were essential to the validity of an indictment, it might be argued that the foreperson was vested with a veto power over indictments and accordingly is possessed of sufficient independent authority over the action of the grand jury to require separate scrutiny of alleged discrimination in foreperson selection at the behest of a criminal defendant seeking dismissal of his indictment. We note that, in *Rose v. Mitchell*, Justice White, joined by Justice Stevens, conditioned his conclusion that discrimination in foreperson selection is a sufficient basis for a defendant's challenge to an indictment upon "the vital importance of the foreman in the functioning of grand juries in Tennessee" (443 U.S. at 589 (White, J., dissenting)). That characterization rested, inter alia, upon the foreperson's veto power over indictments and the fact that the foreperson was selected separately from the other members of the grand jury and yet had the full authority of a grand jury member (*id.* at 589-590 n.1 (quoting *Mitchell v. Rose*, 570 F.2d at 136)). The federal grand jury foreperson has neither of these attributes. See also pages 22-23 note 12, *supra*.

stitutionally significant." For instance, we do not doubt that black or female grand jurors arbitrarily deprived of the opportunity to serve as foreperson have suffered a deprivation of equal protection of the laws that may be redressed in an appropriate civil proceeding. See page 48, *infra*. But petitioner's claim cannot be decided by a standard measuring whether the foreperson's job is important enough to make its performance desirable or worthwhile as a part of citizenship—any more than a defendant should be allowed to contest his indictment by showing discrimination in the employment of security or clerical personnel by the court, in the employment of attorneys by the prosecutor, or in appointment of judges by the President. Rather, petitioner must show that the role of the foreperson is such that discrimination in his or her selection invades the distinctive interests of a defendant that underlie *Strauder*, *Rose* and *Peters*. Measured by this standard, petitioner's claim falls far short of the mark. Whatever informal status or influence the foreperson may enjoy, it scarcely negates the efficacy of proper selection of the grand jury as a whole as a guaranty that a representative spectrum of "human nature and varieties of human experience" (*Peters v. Kiff*, 407 U.S. at 503) is brought to bear upon the decisions made by the grand jury. Nor does any influence or status enjoyed by the foreperson materially increase the highly remote prospect that selection of one member of the body as a foreperson will be perceived as relegating any race or sex to an inferior legal status.

For similar reasons, the other evidence adduced by petitioner to demonstrate the "constitutional significance" of the federal grand jury foreperson does not advance his cause. We need not quarrel with petitioner's characterization of the testimony of the various federal judges who have been required to account for their foreperson appointment practices in cases similar to this one (Pet. Br. 31 (quoting in part, *United States v. Cross*, 708 F.2d at 636)) :

Almost uniformly [the federal judges] select as forepersons those [grand jurors] with good manage-

ment skills, strong occupational experience, the ability to preside, good educational background, personal leadership qualities, and someone who "can not easily be led by the United States Attorney."

Nor do we doubt that federal judges "take the responsibility of appointing a grand jury foreperson with great concern" (Pet. Br. 32.) But it hardly stands to reason, as petitioner suggests, that the district judges entrusted with the supervision of the grand jury would not give careful attention to the selection of a foreperson, and would not bother to look for the qualities described by petitioner unless they believed that "there are special powers or duties in the foreperson far beyond that borne by the other jurors" (Pet. Br. 36-37).

The selection of the foreperson is entrusted to the district court by law (Fed. R. Crim. P. 6(c)). It is hardly significant that a federal judge should carry out any such duty with diligence and care. And it is only rational that qualities such as those listed by petitioner should be sought after by district judges in designating a foreperson. While the duties of the foreperson are generally administrative or clerical in character, it is still important to the administration of justice that they be carried out properly and effectively. But neither the testimony cited by petitioner, nor the apparent judicial consensus that a certain level of experience and personal skills is desirable in a foreperson, indicates that discrimination in selecting a foreperson frustrates the right of a criminal defendant to a tribunal drawn from a representative sampling of the community or to be free from stigmatizing official action reflected in the jury room.

The "theoretical evidence" provided by "social psychiatrists" cited by petitioner (Br. 37-44) is equally deficient in this critical respect. Conceivably the designation of one grand juror as foreperson by the district court enhances to some extent the status of that grand juror in the eyes of his or her colleagues and provides the foreperson with some degree of informal influence greater than his actual authority. But the selection of a fore-

person still does not deprive a defendant of whatever benefit may be derived from the varied points of view of the members of the grand jury or create a substantial appearance of official discrimination within the jury room. The fact remains that, whatever the foreperson's influence, it can operate to affect the defendant's rights only through the body of the grand jury as a whole. See *United States v. Aimone*, 715 F.2d at 827.¹⁹

Unlike petitioner, the court of appeals carefully focused its examination of the role of the federal grand jury foreperson, not upon the abstract importance of the tasks associated with the office, but upon the impact of foreperson selection on the distinctive interests of criminal defendants (see Pet. App. A17-A18; see also page 8, *supra*). Nothing in petitioner's portrayal of the role of the foreperson calls in question the court of appeals' appraisal of his speculative contention (Pet. App. A18):

Any suspicion that [the foreperson's] office may enlarge his capacity to influence other grand jurors is too vague and uncertain to warrant dismissal of indictments and reversals of convictions.

4. The alternative legal bases for petitioner's claim adduced by petitioner and the amici do not warrant any different result here.²⁰

a. Petitioner appears to invoke (Br. 62-70) this Court's Sixth Amendment decisions requiring petit juries to "be drawn from a source fairly representative of the community" (*Taylor v. Louisiana*, 419 U.S. at 538; see also *Duren v. Missouri*, 439 U.S. at 363-364). Of course, the Sixth Amendment, which assures "the accused" in "all criminal prosecutions" the "right to a speedy and public trial, by an impartial jury of the State

¹⁹ In *Aimone* the Third Circuit concluded: "[W]e are not persuaded that the duties performed by a federal foreperson confer the power to control the decision-making process of the grand jury" (715 F.2d at 827).

²⁰ As noted above (pages 14-15; see also page 6 note 4, and pages 7-8 note 6), these arguments were not advanced by petitioner in the courts below.

and district wherein the crime shall have been committed" plainly has no application to the constitution of a grand jury

Amicus Curiae ACLU suggests (Br. 9-18), however, that the Fifth Amendment Grand Jury Clause, which provides that

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury,

should be interpreted to embody a "fair cross section" guaranty for grand jury selection comparable to the Fifth Amendment's requirements for petit jury selection. We may assume that ACLU is correct in this regard. See *Castaneda v. Partida*, 430 U.S. at 509-510 (Powell, J., dissenting). In any event, as the Eleventh Circuit has observed, the Jury Selection and Service Act of 1968, 28 U.S.C. 1861, extends the fair cross section right to include the venire of a federal grand jury. *United States v. Perez-Hernandez*, 672 F.2d at 1384; see page 23, *supra*. But invocation of the Fifth Amendment Grand Jury Clause, the Jury Selection and Service Act of 1968 (see LDEF Br. 14-18), or the fair cross section concept borrowed from Sixth Amendment cases provides no basis for a criminal defendant's challenge to his indictment predicated upon underrepresentation of blacks or women among federal grand jury forepersons.

In *Taylor v. Louisiana*, the Court set forth the basis for its conclusion that petit juries must be drawn from a fair cross section of the community, explaining that among the purposes of a jury is (419 U.S. at 520)

to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps over-conditioned or biased response of a judge. *Duncan v. Louisiana*, 391 U.S., at 155-156. This prophylactic vehicle is not provided if the jury pool is made up of only special segments of the populace or if large, distinctive groups are excluded from the pool. Community participation in the ad-

ministration of the criminal law, moreover, is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system.

But as we have previously explained (pages 20-25), these representational values, which also underlie *Peters v. Kiff*, are fully secured by the Jury Selection and Service Act's requirement that the grand jury be drawn at random from a fair cross section of the community. Identification of one member of that representative group as foreperson is an inevitable occurrence that does not impair the grand jury's ability to serve as the voice of the community. Thus, in holding the fair cross section principle inapplicable to foreperson selection, the Eleventh Circuit has observed (*United States v. Perez-Hernandez*, 672 F.2d at 1385):

[T]he fair cross section analysis is only applicable to groups, such as a grand or petit jury, which can represent society as a whole. One person alone cannot represent the divergent views, experience, and ideas of the distinct groups which form a community. Thus, a grand jury foreman is a member of the group which represents a cross section of his or her community, but he or she cannot be a fair cross section of that community.

See also *Ballew v. Georgia*, 435 U.S. 223, 239 (1978) (jury of five too small to fulfill representational requirements of Sixth Amendment); compare *Williams v. Florida*, 399 U.S. 78, 100 (1970) (jury of six large enough to provide "fair possibility for obtaining a representative cross-section of the community").²¹

Any contention that the fair cross section requirement should be extended to the selection of the foreperson departs entirely from the underlying constitutional text. The explicit guaranties of trial by jury and indictment by a grand jury may reasonably be said to contemplate

²¹ Rotation of the duties of foreperson among the members of the grand jury would arguably be the only way to meet a fair cross section requirement.

bodies of a particular character. But the office of grand jury foreperson has no constitutional foundation at all; it can hardly be claimed that a particular means of designating a foreperson implicates the constitutional right to indictment. Petitioner and the amici offer no historical evidence that a particular mode of foreperson selection is integral to the very notion of a grand jury. Thus because the purpose of the fair cross section requirement is not served by its extension to foreperson selection, there is no justification for bestowing any such novel right upon criminal defendants.

Moreover, in *Taylor v. Louisiana*, the Court pointedly declined to extend the fair cross section requirement beyond jury venires or lists to the jury actually impanelled, stating, "we impose no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population" (419 U.S. at 538). There is obviously less reason to extend that requirement to the designation of one member as foreperson—a designation which inherently cannot reflect fair cross section values in any particular case.

b. Amicus LDEF alone argues (Br. 14-18) that the Jury Selection and Service Act of 1968, 28 U.S.C. (& Supp. V) 1861 *et seq.*, is somehow applicable to the selection of federal grand jury forepersons. Amicus concedes (Br. 15) that nothing on the face of the Act is applicable to discrimination in foreperson selection. Instead LDEF suggests that 28 U.S.C. 1861, which states the policy of the United States "that all citizens shall have the opportunity to be considered for service on grand and petit juries in the district courts of the United States," is broad enough to encompass the selection of grand jury forepersons. We disagree.

Section 1861 states, at the outset, the policy of the United States that all litigants entitled to trial by jury "shall have the right to grand and petit juries selected at random from a fair cross section of the community." If Congress had meant to extend this right to selection of grand jury forepersons it assuredly would have said so explicitly. This is especially so because to do so would

have run contrary to this Court's established teaching that defendants are not entitled to a jury of any particular composition. See *Fay v. New York*, 332 U.S. 261, 284 (1947).

The structure and provisions of the balance of the Jury Selection and Service Act confirm that the Act does not extend so far as LDEF suggests. Following an introductory statement of policy and declaration of rights (28 U.S.C. 1861 and 1862), the Act proceeds to lay out, in extraordinary detail, procedures for establishing plans for random jury selection, for drawing names from a master list of qualified jurors, and for summoning jury panels. Qualifications for jury service are spelled out, as are procedures for challenging compliance with mandated selection procedures. See 28 U.S.C. (& Supp. V) 1863-1867. No mention of the office of foreperson or the selection of a grand jury foreperson is anywhere to be found, however. And the remedial provisions of the Act make clear that it does not cover foreperson selection. They provide that a criminal defendant or the government "may move to dismiss the indictment or stay the proceedings * * * on the ground of substantial failure to comply" with the Act's requirements "in selecting the grand or petit jury." 28 U.S.C. 1867(a) and (b). No comparable remedy is provided for improper foreperson selection.²²

c. Petitioner and amicus LDEF argue (Pet. Br. 70-76, LDEF Br. 4-13); finally, that this Court should exer-

²² Nothing in the legislative history of the Jury Selection and Service Act supports its application to foreperson selection. LDEF suggests (Br. 16-18) that because Congress disapproved the "key man" system for jury selection, it must also have disapproved the discretionary method of foreperson selection that prevails under the Federal Rules of Criminal Procedure. But Congress plainly did not supersede Rule 6(c) in the Jury Selection and Service Act, as it did key man jury selection systems. And the analogy drawn between the two systems by LDEF is insubstantial. The district court's discretion to designate a foreperson from among the members of a properly constituted grand jury has no impact upon the constitution of the grand jury as a whole and thus is not remotely comparable to the key man system of selecting jurors.

cise supervisory power to reverse the conviction of a defendant where discrimination in the selection of the grand jury foreperson is established. But the cases upon which petitioner and LDEF rely²³ simply establish the right of "any defendant to challenge the arbitrary exclusion from jury service of his own or any other class," a right that subsequently has been recognized as premised upon the Sixth Amendment right to a jury drawn from a fair cross section of the community. See *Peters v. Kiff*, 407 U.S. at 500 & n.9 (opinion of Marshall, J.). Nothing in these cases—each of which entails exclusion of a substantial class of eligible persons from the jury as a whole—establishes that exercise of supervisory power to reverse a defendant's conviction is appropriate when any discrimination is limited to the selection of a foreperson from among the members of a properly constituted grand jury. Moreover, the Court has emphasized that "the supervisory power does not extend so far" as to "confer on the judiciary discretionary power to disregard the considered limitations of the law it is charged with enforcing." *United States v. Payner*, 447 U.S. 727, 737 (1980). Accordingly, if, as we contend, the principles of equal protection and due process enunciated in *Strauder* and its progeny and *Peters v. Kiff*, do not require that a defendant's conviction be reversed and his indictment dismissed in the circumstances of this case, the supervisory power of this Court and of the lower federal courts should not be employed to circumvent deliberately established limits upon the procedural rights recognized in those cases.²⁴

²³ *Glasser v. United States*, 315 U.S. 60 (1942), *Thiel v. Southern Pacific Co.*, 328 U.S. 217 (1946), and *Ballard v. United States*, 329 U.S. 187 (1946).

²⁴ In *United States v. Hasting*, No. 81-1463 (May 23, 1983), slip op. 6, the Court recognized that one of the purposes that may justify use of supervisory power is "to implement a remedy for violation of recognized rights." But, as we have explained, discrimination limited to the selection of a federal grand jury foreperson from among its members does not engage any right of a criminal defendant such as petitioner to an impartial or broad-based tribunal, or to

B. Scrutiny of Foreperson Selection Practices At the Behest of a Criminal Defendant in the Manner Proposed by Petitioner Would Impose Substantial and Unwarranted Burdens upon the Administration of Justice

In *Rose v. Mitchell*, 443 U.S. at 557, the Court acknowledged that there are "costs associated with" permitting a criminal defendant to challenge his indictment on the basis of discrimination in jury selection against members of a population group that includes the defendant. But the Court concluded that those costs were outweighed in that setting by the policy of combating racial discrimination. As we have explained above, the discrimination alleged here simply does not engage the interests of a criminal defendant that the Court has guarded in previous equal protection and due process rulings regarding jury selection. In addition, the costs for the administration of justice associated with recognizing a defendant's right to challenge his indictment on the basis of alleged discrimination limited to the naming of the foreperson are substantially greater than those that are present when the allegation is that the entire grand jury or petit jury has been selected in a discriminatory manner.

1. The rule that petitioner urges upon this Court is borrowed from cases where discrimination in the constitution of the grand jury as a whole is alleged. See, e.g., Pet. Br. 59-61 (quoting *Castaneda v. Partida*, 430 U.S. at 494-495). Thus, like the Eleventh Circuit, petitioner maintains:

In order to support a prima facie case in the context of grand jury foremen, a defendant must establish three factors. First, the group allegedly discriminated against must be "one that is a recognizable distinct class, singled out for different treat-

be free of stigmatizing influences in the jury room. And, as we explain below (pages 46-50), granting a remedy to a criminal defendant is not necessary to protect the rights of black or female grand jurors to a fair opportunity to be considered for the post of grand jury foreperson.

ment under the laws." Second, the group must be substantially underrepresented in the office of grand jury foreman over a significant period of time. Third, in order to complete the presumption of discrimination raised by the statistical evidence, the defendant must show that the selection procedure is not racially neutral or is susceptible to abuse as a tool of discrimination.

United States v. Perez-Hernandez, 672 F.2d at 1386-1387 (quoting *Castaneda v. Partida*, 430 U.S. at 494). If such a prima facie case is made out by showing historic underrepresentation of women or blacks, then the burden of rebutting an inference that this statistical pattern is attributable to intentional discrimination is said to shift to the government (Pet. Br. 61 (quoting *Castaneda v. Partida*, *supra*); I C.A. App. 207; see also *United States v. Perez-Hernandez*, 672 F.2d at 1387).

In mechanically borrowing this "rule of exclusion" from grand jury and petit jury selection cases, petitioner and the Eleventh Circuit have failed to recognize that its operation is materially different in the context of a challenge to the selection of the foreperson.²⁵ It is

²⁵ In *Rose v. Mitchell*, 443 U.S. at 591, Justice White, joined by Justice Stevens (the only members of the Court having occasion to address the point) observed that because of the small numbers involved, the "rule of exclusion" applied in jury selection cases "may not be well suited" to claims of discrimination limited to foreperson selection. See also *Washington v. Davis*, 426 U.S. 229, 253 (1976) (Stevens, J., concurring) (observing that the elements of a prima facie case of discrimination must be defined in a manner appropriate to the particular context in which discrimination is alleged to have occurred). A substantial argument could be made that, unlike underrepresentation of any significant population group among the members of grand juries or petit juries, underrepresentation of such a group among grand jury forepersons is not so unlikely to be explainable on grounds other than intentional discrimination that it should be sufficient to raise a prima facie case of discrimination. Compare *Castaneda v. Partida*, 430 U.S. at 493; *Washington v. Davis*, 426 U.S. at 241. Thus, it is our view that petitioner and the Eleventh Circuit have improperly applied the method of proof employed in jury selection cases in the foreperson

a misleading euphemism to state, in this context, that when statistical proof of underrepresentation of some group is adduced, the burden shifts to the "government" to demonstrate that the selection process did not entail discrimination. The foreperson of a federal grand jury is selected by the district judge who impanels and supervises the grand jury. Unlike more conventional challenges to the constitution of a grand jury or petit jury, therefore—where rebuttal may be accomplished by introducing written records and the testimony of clerical personnel—the only means realistically available to "the government" to rebut an inference of discrimination in the selection of forepersons is to call as witnesses the United States District Judges that have appointed grand jury forepersons. See *United States v. Cabrera-Sarmiento*, 533 F. Supp. 799, 805 (S.D. Fla. 1982).²⁶ The sitting

selection context. If, contrary to our main submission, a criminal defendant is entitled to seek dismissal of his indictment on the basis of alleged discrimination in the selection of a foreperson, he should at least be required to exclude "the most common non-discriminatory reasons" for underrepresentation before the burden is placed upon the court to rebut an inference of discrimination. See *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981). In view of the substantial nonracial criteria that are generally employed to select forepersons (see pages 45-46, *infra*) a defendant's prima facie case should include evidence that blacks and women were on the indicting grand jury and available for appointment, and that their qualifications for selection as foreperson were at least equal to those of the person appointed. In this case the record is silent as to the membership of the grand jury that indicted petitioner (see page 5, *supra*). (We note that consistent application of the rule of exclusion to the foreperson selection context would require, at a minimum, that the proportion of black or female forepersons be measured against the membership of the grand juries from which they were drawn, rather than the population as a whole as was done here. See *United States v. Cabrera-Sarmiento*, 533 F. Supp. 799, 805-806 (S.D. Fla. 1982). Petitioner did not present evidence necessary to make the proper comparison (see pages 5-6, *supra*).)

²⁶ This procedure was employed in *United States v. Cabrera-Sarmiento*, 533 F. Supp. at 805 (number of judges testifying not specified); *United States v. Breland*, 522 F. Supp. 468, 471-474

judges of the district court are then disqualified to hear such a case, and a visiting judge from another district or the court of appeals must be designated for this purpose.²⁷ The district judges are required to testify in considerable detail as to the methods they use for foreperson selection, the criteria employed, and any discriminatory practices. See, e.g., *United States v. Breland*, 522 F. Supp. 468, 471-474 (N.D. Ga. 1981).

Judge Hatchett of the Eleventh Circuit, who has heard a number of such cases sitting by designation in the district courts, has explained that "[b]ecause the elements of a prima facie case remain constant from one defendant to another, it is theoretically possible for a different de-

(N.D. Ga. 1981) (nine judges testifying); *United States v. Manbeck*, 514 F. Supp. 141, 150 (D. S.C. 1981) (two judges testifying); *United States v. Northside Realty Associates*, 510 F. Supp. 668, 683-684 (N.D. Ga. 1981) (eight judges testifying); *United States v. Holman*, 510 F. Supp. 1175, 1180-1181 (N.D. Fla. 1981), aff'd, 680 F.2d 1340 (11th Cir. 1982) (two judges testifying); *United States v. Jenison*, 485 F. Supp. 655, 665-666 (S.D. Fla. 1979) (eight judges testifying). See also *Perez-Hernandez*, 672 F.2d at 1383 (decided, pursuant to stipulation, on the basis of the record in *Jenison*).

²⁷ This procedure was employed in all of the cases listed in the previous footnote except for *Manbeck*.

Application of the rule of exclusion to the grand jury foreperson selection context in the Eleventh Circuit appears to be logically flawed. Unlike juror selection, which is typically a centralized process carried out in a uniform manner in any judicial district or jurisdiction, the selection of a foreperson in the federal system is, as petitioner observes (Pet. Br. 22), an informal process carried out by district judges acting separately. It is not at all clear why all of the appointments made in a given district over some period of time should be lumped together for purposes of statistical examination. Absent a showing of joint action, the "track record" of any given federal judge is not probative of the intent of any other judge. See *United States v. Holman*, 680 F.2d at 1357 n.13 (where defendant was indicted by the first grand jury impanelled by a newly appointed district judge, "a serious question remains as to whether statistics dealing with selections by other judges during the past ten years indeed prove anything at all with regard to the instant appointment"). The record in this case does not reveal the identity of the judges whose appointments were the

fendant to appear each week, presenting the same statistics showing underrepresentation and questioning the same judges as to their mental intent in selecting forepersons." *United States v. Cabrera-Sarmiento*, 533 F. Supp. at 806. Moreover, "each defendant indicted by a grand jury [may apparently] bring[] a new challenge notwithstanding the fact that the judge in question has already testified to the satisfaction of the factfinder that he did not harbor discriminatory intent in selecting forepersons" (*ibid.*).²⁸ The result is described in justifiably pointed terms in *Cabrera-Sarmiento* (*ibid.*):

We are witnessing a criminal proceeding in which the defendant lounges in the gallery watching his lawyer try the system. A parade of judges, clerks of court, and other court personnel take the witness stand to defend their every action and their character under cross-examination.^[29]

basis for the defendant's statistical showing or the identity of the impanelling judge in petitioner's case.

²⁸ We note that the rule of exclusion borrowed from the jury selection cases is a blunt instrument in the foreperson selection context. A defendant has suffered no invasion of his rights unless he has been indicted by a grand jury the foreperson of which was selected in a discriminatory manner. See *Castaneda v. Partida*, 430 U.S. at 506 (Burger, C.J., dissenting); compare *id.* at 496-497 nn. 16-17; cf. *Rose v. Mitchell*, 443 U.S. at 572 n.12. Under petitioner's view of the law, any defendant indicted by a grand jury with a white male foreperson in a district where blacks or women were historically underrepresented in that post is able to cast the burden on the court of accounting for its selection of forepersons. Yet even under a wholly random system of foreperson selection a substantial proportion of forepersons would be white and male in most districts. By contrast, on a multi-member grand jury or petit jury, the absence of blacks or women is a more telling index of possible discrimination. Accordingly, the rule of exclusion operates in a highly indiscriminate manner in the foreperson selection context, substantially magnifying the burden placed upon the courts.

²⁹ The United States Attorney's Office for the Southern District of Florida advises us that the "theoretical" possibility adverted to in *Cabrera-Sarmiento* has become a stock in trade of criminal defense practice there. See also *Miami Herald*, Dec. 23, 1981, at 1B

We think it evident that this form of proceeding entails a substantial disruption of the administration of justice, diverts the court from its central tasks, and does little to bolster "the confidence of the public in the administration of justice" (*Rose v. Mitchell*, 443 U.S. at 556). But we do not accept Judge Hatchett's suggestion (*Cabrera-Sarmiento*, 533 F. Supp. at 806) that this must be "the end result of *Rose v. Mitchell*." Rather, in light of the substantial burden imposed upon the administration of justice, the disfavor with which recourse to judicial testimony is generally viewed,³⁰ and the minimal impact, if any, of the alleged discrimination on defendants' rights, we think the principles underlying *Rose v. Mitchell* and its progenitors do not require this exercise in judicial self-examination.

The substantial disproportion between the costs and benefits of permitting defendants to require the judges of the district court to account for their foreperson selection practices is highlighted by the results of those cases—all in the Eleventh Circuit—in which the government has been put to its rebuttal in this manner. In every instance that we are aware of where the issue was reached, the court determined that the judicial testimony adduced by the government dispelled any inference of discrimination.³¹ Strikingly, these determinations were made

(more than 100 defendants joined in an omnibus motion to dismiss their indictments in *Cabrera-Sarmiento*). According to the United States Attorney, even where defense counsel stipulate that reliance upon judicial testimony given in prior cases is permissible, newly appointed judges are required to be examined on their selection practices, and judges previously examined are periodically required to testify as to their most recent foreperson appointments.

³⁰ See *Washington v. Strickland*, 693 F.2d 1243, 1263 (5th Cir. 1982) (en banc), cert. granted, No. 82-1554 (June 6, 1983); cf. *Fayerweather v. Ritch*, 195 U.S. 276 (1904).

³¹ *United States v. Holman*, 680 F.2d at 1357, aff'g 510 F. Supp. at 1180; *United States v. Perez-Hernandez*, 672 F.2d at 1387-1388; *United States v. Cabrera-Sarmiento*, 533 F. Supp. at 805; *United States v. Breland*, 522 F. Supp. at 479-480; *United States v. Manbeck*, 514 F. Supp. at 150; *United States v. Jenison*, 485 F. Supp. at 665.

on the basis of the very same testimony that petitioner characterizes as follows (Pet. Br. 31 (quoting *United States v. Cross*, 708 F.2d at 636)) :

Almost uniformly [the district judges] select as forepersons those with good management skills, strong occupational experience, the ability to preside, good educational background, personal leadership qualities[,] and someone who "can not easily be led by the United States Attorney."

Petitioner also tells us (Pet. Br. 32) (and we agree) that the testimony shows that district judges take their appointment responsibility very seriously, and carefully review pertinent data about grand jurors in applying those criteria. Unlike petitioner we find no warrant in this testimony for continuing the onerous practice required by the Eleventh Circuit. On the contrary, the testimony canvassed in petitioner's brief and in the decided cases confirms that even where statistical underrepresentation of blacks and women in the position of foreperson has been found, the cause is highly unlikely to be unlawful intentional discrimination. Because it appears so unlikely that statistical underrepresentation of women or minority group members is attributable to intentional discrimination in this setting, a presumption to that effect that triggers a burdensome and sterile exercise in judicial self-scrutiny at the behest of a criminal defendant is not warranted. See *United States v. Goodwin*, 457 U.S. 368, 384 (1982).³²

2. The salutary policy of combating racial or gender discrimination in the administration of justice does not require that defendants be permitted to seek dismissal of their indictments on the basis of alleged discrimination in the selection of a federal grand jury foreperson; nor is this remedy needed to vindicate by proxy the rights of

³² We note, as well, that the decision to select a foreperson is necessarily based partly on highly subjective impressions of the members of the grand jury. Just as appellate courts are loathe to look behind a trier of fact's assessment of witness credibility, the courts should be wary of engaging in retrospective evaluation of any particular foreperson selection.

grand jurors who allegedly have been denied fair consideration for appointment as forepersons. Other, more appropriate, means are available to assure that the policy of nondiscrimination is given effect in this setting. Because the allegation of discrimination in foreperson selection is directed against a United States district judge—and effectively constitutes a claim of infidelity to the judge's oath of office (see 28 U.S.C. 453)—it is fitting that recourse be made to these alternative procedures, which generally are designed to provide this Court, the Judicial Conference of the United States, and the Circuit Judicial Councils with effective collegial and supervisory means of eliminating impediments to the administration of justice arising from the operations of the judicial system or the actions of any individual federal judge.

In any instance where one or more individuals believe that they have been unfairly passed over by the court in the selection of a grand jury foreperson as a result of intentional discrimination, or where affected individuals believe that any United States district judge has engaged in a pattern of such discrimination, such practices may properly be called to the attention of the Judicial Council for the appropriate circuit, established pursuant to 28 U.S.C. (& Supp. V) 332. The judicial councils are empowered to address "impediment[s] to the administration of justice" and are directed to "make all necessary and appropriate orders for the effective and expeditious administration of justice" within their respective circuits (28 U.S.C. (Supp. V) 332 (d) (1) and (3)). In order to provide any necessary evidentiary basis for entry of such an order, moreover, the judicial councils are authorized "to hold hearings, to take sworn testimony, and to issue subpoenas and subpoenas duces tecum" (28 U.S.C. (Supp. V) 332(d)(1)). "All judicial officers" within the circuit are required promptly to carry out all orders of the judicial council (28 U.S.C. (Supp. V) 332(d)(2)). We submit that the mechanism thus created is the appropriate mechanism for correcting any improper grand jury

foreperson selection practices that are thought to prevail in any district court.³³

The Judicial Conference of the United States also has a role to play in rectifying a pattern of discriminatory foreperson selection, should it appear that a serious problem of this nature actually exists. The Conference is required to "comprehensive[ly] survey" the business of the federal courts and "continuous[ly] study . . . the operation and effect of the general rules of practice and procedure" in effect for United States Courts. 28 U.S.C. (& Supp. V) 331. Toward that end, the Conference may establish any necessary standing committees to investigate matters within its jurisdiction. Such committees are empowered, like the Judicial Councils, to hold hearings, take sworn testimony, and issue subpoenas in connection with their exercise of authority. *Ibid.* Should it appear upon investigation that the present provisions of the Fed. R. Crim. P. 6(c) are inadequate to ensure that foreperson selection is carried out in a nondiscriminatory manner, the Judicial Conference is empowered to recommend to this Court any amendment to that Rule necessary to carry out that salutary objective. 28 U.S.C. (& Supp. V) 331. And, of course, this Court is empowered to prescribe such rules as may be appropriate for this purpose. 18 U.S.C. 3771. Thus, appropriate means are at hand for eliminating any discrimination that may exist, without resort to reversing criminal convictions and dismissing indictments with the attendant windfall to defendants who have suffered no invasion of their rights. *Cf. United States v. Hasting*, slip op. 6-7 & n.5.

In addition to the foregoing procedures, it appears that members of any class of persons unlawfully excluded from service as grand jury forepersons could maintain a civil action for injunctive relief challenging the offending practices on behalf of themselves or any affected

³³ In the unlikely event that any judicial officer should persist in a course of discrimination in the face of the orders of the Judicial Council, it may be appropriate to file a complaint with the clerk of the court of appeals pursuant to the disciplinary procedures established under 28 U.S.C. (Supp. V) 372(c).

class. See *Carter v. Jury Commission*, 396 U.S. 320, 329-330 (1970); *Turner v. Fouche*, 396 U.S. 346 (1970).³⁴ This remedy too "has the advantage of allowing the members of the class actually injured by * * * discrimination to vindicate their rights without the heavy societal cost entailed when valid criminal convictions are overturned" (*Rose v. Mitchell*, 443 U.S. at 578 (Stewart, J., concurring in the judgment)).

Even without litigation or formal action by appropriate judicial authority there is good reason to believe that the problem of underrepresentation of blacks and women among federal grand jury forepersons is a vanishing one. As the court of appeals noted (Pet. App. A14 n.6), subsequent to the return of the indictment in this case, blacks and women have been represented among grand jury forepersons in the Eastern District of North Carolina. Moreover, the filing of motions to dismiss indictments such as the one in the present case, and the attention the resulting litigation has by now focused upon the need for appropriate foreperson selection methods, coupled with increased sensitivity throughout the legal system toward the importance of race- and sex-blind justice generally, is likely to ensure fair representation of all racial and gender groups among federal grand jury forepersons in the future.³⁵

³⁴ Mandamus may also be available to correct any act of unlawful exclusion that is challenged contemporaneously by one so excluded.

³⁵ Substantial confirmation for that belief is provided by a survey of United States Attorneys conducted by the Department of Justice prior to our acquiescence in the petition for a writ of certiorari in this case. The responses to our inquiries disclose a striking pattern in those districts where there may have been a historical pattern of underrepresentation of women or minorities among forepersons. (That such underrepresentation existed in some districts does not, of course, demonstrate that it was attributable to purposeful discrimination.) In district after district where underrepresentation was believed to have existed in the past, the district courts have recently taken special care to select forepersons in a fashion representative of the community. Moreover, to ensure that no reversal of this trend occurs, the Department of Justice will, irrespective of the ultimate disposition of this case, continue the efforts it has undertaken through the United States Attorneys to call the

In light of these effective avenues for assuring full implementation of the strong policy against discrimination in the administration of justice as it applies to the selection of federal grand jury forepersons, there is no reason to allow criminal defendants to seek dismissal of their indictments by alleging discrimination in this context. Indeed, because of the striking disproportion between the wrong, if any, suffered by a defendant such as petitioner and the remedy sought, reversal of convictions and dismissal of indictments on the ground of discriminatory underrepresentation of members of a particular class in selection of forepersons from among the members of properly constituted grand juries would undermine, rather than bolster "the confidence of the public in the administration of justice" (*Rose v. Mitchell*, 443 U.S. at 556). As Judge Morgan stated in *United States v. Perez-Hernandez*, 672 F.2d at 1389 (concurring opinion), one

must wonder how society would view the integrity of our courts if unharmed criminal defendants are released because of discrimination which is unrelated to any significant part of the judicial system. The social costs are not justified in this instance.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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MARCH 1984

attention of the district courts to the importance of nondiscriminatory foreperson selection procedures.

No. 82-21409

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

WILBUR HOBBY,

PETITIONER

V.

UNITED STATES OF AMERICA,

RESPONDENT

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
FOURTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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Petitioner Wilbur Hobby respectfully
submits this reply brief to restate the facts of
this case in a straightforward fashion; and
restate the issues in light of the various
contentions now before the Court.

THE FACTS OF THE CASE AND THE
DECISIONS BELOW.

This is a case in which the Article III federal judges in the Eastern District of North Carolina exercised the appointive power vested in them by section 6(c) of the Federal Rules of Criminal Procedure to select white males as forepersons of fifteen consecutive grand juries extending over a seven year period. No blacks, no women were chosen for this leadership position.

Petitioner Wilbur Hobby (a white male) and Mort Levi (a black male) were indicted by one of these federal grand juries for conspiring to defraud the United States in connection with a CETA training program. Prior to trial, they filed motions to dismiss the indictments, and primarily relied on this Court's holding in Rose v. Mitchell, 443 U.S. 545

(1979). In Rose, this Court assumed that the practice of Tennessee judges to appoint only white males to be forepersons of the Tennessee grand juries required the dismissal of indictments issued by the grand juries so tainted.

In response, the government did not dispute that a prima facie case was made out by the testimony of petitioner's expert witness nor did it put on any evidence of any kind to justify the appointment by the Article III judges of white males only. Nor did the government argue that Rose was not controlling. Government cross examination sought only to show that the expert witness had no first-hand experience in the operations of grand juries. (J.A. 96-97). The District Court, without comment on this point, denied the motion to dismiss. (J.A. 113).

On appeal, the government argued only that Rose v. Mitchell was distinguishable

on its facts, because the forepersons of Tennessee grand juries played a larger role than did the forepersons of federal grand juries. The Court of Appeals accepted the evidence that "in the years 1974-1981 no Black had served as foreman of the grand jury in that district, and no woman" but held that Rose was not applicable. The Court below agreed with the Government's contention and affirmed the conviction because:

"The roles of grand jury foreman in the federal system differ substantially from the roles of grand jury foremen in Tennessee and other states.... Their role is so little different from that of any other grand juror that the rights of defendants are adequately protected by assurance that the composition of the grand jury as a whole cannot be the product of discriminatory selection."

THE ISSUES NOW BEFORE
THIS COURT AND
THE POSITIONS TAKEN BY THE PARTIES

The issue on appeal to this Court is whether the courts below erred in

condoning the exclusive appointment of white males as forepersons of the federal grand juries. The positions of the parties are set forth below.

A. The Position of the Petitioner.

in Rose, this Court assumed, "without deciding" that:

"discrimination with regard to the selection of only the foreman requires that a subsequent conviction be set aside, just as if the discrimination proved had tainted the selection of the entire grand jury venire". 443 U.S. at 552, n. 551-552, n. 4.

Mr. Justice Blackmun wrote for the Court as follows:

"Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice. Selection of members of a grand jury because they are of one race and not another destroys the appearance of justice and thereby casts doubt on the integrity of the judicial process. The exclusion from grand jury service of Negroes, or any groups otherwise qualified to serve, impairs the confidence of the public in the

administration of justice. As this Court repeatedly has emphasized, such discrimination 'not only violates our Constitution and the laws enacted under it but is at war with our basic concepts of a democratic society and a representative government'. Smith v. Texas, 311 U.S. 128, 130 (1940). The harm is not only to the accused, indicted as he is by a jury from which a segment of the community has been excluded. It is to society as a whole. 'The injury is not limited to the defendant--there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts'. Ballard v. United States, 329 U.S. 187, 195 (1946). 443 U.S. 555-556.

Petitioner relies heavily on the rationale thus expressed in Rose, and began his brief by addressing head-on the holding of the court below that Rose is inapplicable because the foreman of Tennessee grand juries plays a larger role than does the foreperson of federal grand juries. Petitioner referred not only to Federal Rule of Criminal Procedure 6(c),

but also to the Handbook for Federal Grand Juries, the Model Charge to the Grand Juries, the statements of federal judges regarding their appointments, and the expert testimony of the social psychiatrists. Then, assuming arguendo and against the facts that federal forepersons play only the limited role as held by the Court below, petitioner argued that in any event, an Article III judicial selection process based on race or gender, either in whole or in part, cannot survive judicial review.

1. First, Petitioner reviewed the Equal Protection cases arising under the Fourteenth Amendment. Petitioner recognized the "same class rule" prevailing in these cases, but presented them as setting the tone in federal cases. See Hurd v. Hodges, 334 U.S. 24 (1948) where this Court "in the exercise of its supervisory powers over the courts of the

District of Columbia" refused to permit the judicial enforcement of restrictive racial covenants. Mr. Chief Justice Vinson adverted to the companion case of Shelley v. Kraemer, 334 U.S. 1 (1948) and held that:

"It is not consistent with the public policy of the United States to permit federal courts in the Nation's capital to exercise general equitable powers to compel action denied the state courts where such state action has been held to be violative of the guaranty of the equal protection of the laws. We cannot presume that the public policy of the United States manifests a lesser concern for the protection of such basic rights against discriminatory action of federal courts than against such action taken by the courts of the States". 334 U.S. at 351.

See also Bolling v. Sharpe, 347 U.S. 497 (1954) where this Court struck down segregation in the public schools of the District of Columbia. Mr. Chief Justice Warren adverted to the companion case of Brown v. Board of Education, 347 U.S. 483

(1954) and held that:

"In view of our decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government. We hold that racial segregation in the public schools of the District of Columbia is a denial of the due process of law guaranteed by the Fifth Amendment to the Constitution". 347 U.S. at 500.

2. Petitioner then moved on to Peters v. Kiff, 407 U.S. 493 (1972); Taylor v. Louisiana, 419 U.S. 522 (1975), and Duren v. Missouri, 439 U.S. 357 (1979)--cases arising under Fifth and Sixth Amendments wherein the "same class rule" was abandoned. Prejudice was presumed in Peters, because as Mr. Justice Marshall wrote:

"when any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps

unknowable". 407 U.S. at 503.

And in Taylor, Mr. Justice White held for the Court that the accused is "constitutionally entitled to a jury drawn from a fair cross section of the community", in large part because

"Community participation in the administration of the criminal law, moreover, is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system". 419 U.S. at 530.

3. Finally, petitioner reached the "supervisory power" case of Glasser v. United States, 315 U.S. 60 (1942), Thiel v. Southern Pacific Co., 328 U.S. 217 (1946), and Ballard v. United States, 329 U.S. 187 (1946). These cases hold that "reversible error does not depend on a showing of prejudice in an individual case" because

"The evil lies in the admitted exclusion of an eligible class or group in the community in disregard of prescribed standards of jury selection...."

Moreover, continued Mr. Justice Douglas:

"The injury is not limited to the defendant--there is injury to the jury system, to the law as an institution, to the community at large, to the democratic ideal reflected in the processes of our courts". Ballard v. United States, 329 U.S. 187 at 195.

Exercise of the Court's "Supervisory Power" is especially demanded here. The Article III judges below were delegated the power to appoint forepersons by the Federal Rules of Criminal Procedure, promulgated by this Court. Thus, this Court is doubly involved. It has a general responsibility to supervise the conduct and activities of the lower federal courts as in Hurd and in Ballard above; it has a special accountability to ensure that the power it delegates is not utilized in an discriminatory fashion.

B. The Positions of the Amici Curiae

1. In Peters v. Kiff, 407 U.S. 493,

Mr. Justice White, with whom Mr. Justice Brennan and Mr. Justice Powell joined, concurred in the judgment that a white person had standing to protest the systematic exclusions of black persons from Georgia juries:

"to implement the strong statutory policy of section 243, which reflects the central concern of the Fourteenth Amendment with racial discrimination, by permitting petitioner to challenge his conviction on the grounds that Negroes were arbitrarily excluded from the grand jury that indicted him. This is the better view, and it is time that we now recognized it in this case and as the standard governing criminal proceedings instituted hereafter".
407 U.S. at 507.

The NAACP Legal Defense and Educational Fund, Inc. filed an Amicus brief urging a like result under the Jury Selection and Service Act of 1968, 28 U.S.C. 1861 et seq. That Act declares that it is the policy of the United States:

"that all citizens shall have the opportunity to be considered for

service on grand and petit juries
in the district courts of the United
States...."

The NAACP Legal Defense and
Educational Fund acknowledged that
Congress did not "specifically outlaw
discrimination in appointment of grand
jury forepersons", but contends that the
general language, sweep, and legislative
history of the Act support "application of
the statutory bar on discrimination to all
aspects of discrimination within the grand
and petit jury systems". Brief at p. 16.

2. In Taylor v. Louisiana, 419 U.S.
522, this Court held that "the presence of
a fair cross section of the community on
venires, panels, or lists from which petit
juries are drawn is essential to the
fulfillment of the Sixth Amendment's
guarantee of an impartial jury trial in
criminal prosecutions". 419 U.S. at 526.

Amicus American Civil Liberties Union
argues that so too, a representative

cross section of the community is an essential component of the Fifth Amendment guarantee that "no person" shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury". Reliance is placed on Mr. Justice Powell's dissent in Castaneda v. Partida, 430 U.S. 482 (1977) that the federal right derived from the Fifth Amendment's explicit requirement of a grand jury "is similar to the right--applicable to state proceedings--to a representative petit jury under the Sixth Amendment. See Taylor v. Louisiana, 419 U.S. 522".

C. The Position of the Respondent.

The Government does not contend that the "white male only" appointments are lawful. It admits that they are unlawful.

In its Response To The Petition for Certiorari, the Government announced an intention "to take steps to ensure that

the United States Attorneys call the attention of the courts in their respective districts to the importance of nondiscriminatory foreperson selection procedures". Brief for the United States, p. 16, n. 9. In its brief on the merits, the Government begins its Summary of Argument with the following statement:

"The issue in this case is not whether discrimination against blacks or women in the selection of grand jury forepersons is lawful, for there is no dispute between the parties that it is not". Brief for the United States, p. 9

What then, does the United States argue? Frankly, petitioner has difficulty in answering this question, but sets forth his understanding as best he can.

First. The Government contends that the Fourteenth Amendment Equal Protection cases apply the "same class" rule and that petitioner as a white male has no "standing" to protest the exclusion of blacks or women. Brief, pp. 15-20. But

the Government does not deny that these cases set the tone and give guidance to this Court when exercising its supervisory power over the lower federal judiciary.

Second. Assuming "standing" under Peters and the Due Process Clause, the Government suggests that discrimination in the appointment of the foreperson is irrelevant ("in the absence of any overt manifestation of prejudice") when the discrimination "does not at all affect the overall composition of the grand jury". Brief, pp. 20-24.

That, of course, is the very issue before this Court.

Third. The Government suggests that discrimination in the selection of the foreperson is permissible as long as the discrimination is hidden from public view. Brief, pp. 25-26. The government points out that the grand jury "operates out of the public eye," and the identity, race

and gender of forepersons are not matters "generally known to the public--or to the members of a given grand jury". The Government admits that "a different result might be warranted" if a defendant "could show an open and notorious practice" by the supervising court of "explicitly excluding black or female grand jurors from consideration as forepersons by reason of their race or sex". But, concludes the Government, "petitioner does not claim that any such evidence of discrimination exists in this case". The only fitting response is "shame".

Fourth. The government repeats its arguments made to the Fourth Circuit that the duties of the forepersons are "essentially those of a clerk"; and that there is no showing here that "discrimination in his or her selection invades the districtive interests of a defendant". Brief pp. 28-34.

Fifth. Turning to the "fair cross section" requirement of Taylor and Duren, the Government contends that it cannot be extended to the selection of the foreperson, as one person alone cannot represent the divergent views, experiences and ideas of the distinct groups which form a community. Brief, pp. 34-38. Of course, petitioner is not arguing for the impossible. We do not dispute that there can be but one foreperson per grand jury. But we do contend that there be no systematic exclusion of blacks and women from foreperson positions over an extended period of time.

Sixth. The Government suggests that the Court has no "supervisory power" to correct the admitted unlawful discrimination in this case, and refers to United States v. Payner, 447 U.S. 727 (1980) and United States v. Hasting, ___ U.S. ___ 103 S.Ct. 1974 (1983).

In Payner, it was held that the District Court had no "supervisory authority" to suppress the fruits of an unlawful search that did not invade the respondent's Fourth Amendment rights, as this ran directly counter to the decisions that a court may not exclude evidence under the Fourth Amendment unless there is a violation of the defendant's own constitutional rights. In Hasting, it was held that the District Court erred in reversing a conviction because of comment in the prosecutor's closing argument, as this ran directly counter to the decisions that a conviction is not to be reversed because of error that is harmless. These cases are entirely inapposite. Each concerned the exercise of supervisory power by the District Courts in a way which conflicted with the results demanded by this Courts' decisions when deciding interrelated constitutional issues. Here,

of course, we urge exercise of this Court's supervisory power to implement, (not to defeat), an unbroken line of constitutional decisions going back for more than 1000 years.

Finally, the Government urges that the remedy of dismissing the indictment because of illegality in the discriminatory appointment of grand jury forepersons would impose substantial and unwarranted burdens upon the administration of justice. The Government suggests as an alternative, a novel and wholly untested administrative scheme of redress. Brief, pp. 40-50. In short, the Government asks this Court to repudiate a remedy forged in the triad cases of 1880, and reaffirmed over strenuous dissent just four years ago in Rose v. Mitchell.

CONCLUSION

In all its contentions, the government proceeds on grounds entirely too narrow and artificial. Not once does it come to grips with the repeated holdings of this Court that exclusion of jurors because of race or gender is at war with our basic concepts of a democratic society; that such exclusion is odious in all aspects, and especially pernicious in the administration of justice; that it destroys the appearance of justice and casts doubt on the integrity of the judicial process; and above all, that the harm is not limited to the accused but injury extends to the jury system, to the law as an institution, to the community at large, and to the democratic ideal.

For reasons set forth above, and in the Brief in Chief, petitioner respectfully suggests that the decision below be reversed, and the indictment set

aside.

Respectfully submitted,

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BER L. STEVAS
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

WILBUR HOBBY,

Petitioner,

—vs.—

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

**BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION
AND THE AMERICAN CIVIL LIBERTIES UNION OF
NORTH CAROLINA, *AMICI CURIAE***

IN SUPPORT OF REVERSAL

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INTEREST OF AMICI CURIAE

The American Civil Liberties Union is a nationwide, non-partisan organization of over 250,000 members, dedicated to preserving and defending the rights guaranteed by the Constitution. The ACLU of North Carolina is one of its state affiliates.

This is the first case that we can recall, in half a century, in which the United States has defended before this Court and sought to preclude a remedy for the government's reservation of a position exclusively for white males. As such, and involving as it does the solemn institution of the grand jury which lies at the heart of the criminal justice system, this case presents an extremely important issue requiring the most careful scrutiny and analysis. We file this brief amici curiae, with the consent of both parties, to assist the Court in that undertaking, and to provide it with an approach

which has to our knowledge escaped the attention of the lower courts which have heretofore considered this issue.

STATEMENT OF THE CASE

Wilbur Hobby, President of the (inter-racial) North Carolina AFL-CIO, was indicted for federal fraud, namely, misappropriating funds secured by contract under a federal program for the training of unemployed and unskilled young persons in North Carolina. Prior to trial, by appropriate motion, he moved to dismiss the indictment on the basis that it was constitutionally defective and that he thus could not "be held to answer" according to the Fifth Amendment. More particularly, he alleged that the position of foreman of the grand jury which had presumed to indict him had been reserved for white males only, pursuant to an apparent pattern or practice characteristic of the federal

judicial district in which the indictment was returned.

In the ensuing hearing on his claim, his counsel, pursuant to burden-of-proof guidelines laid down by this Court (see Castaneda v. Partida, 430 U.S. 482 (1977) and Peters v. Kiff, 407 U.S. 593 (1972)), established what he regarded to be a sufficient prima facie case of such purposive racial discrimination. The evidence consisted principally of data showing that during a relevant six year period (1974-81), of fifteen federal grand juries held in that district, all had white male foremen although 30 percent of the resident population was nonwhite and, indeed, 20 percent of the grand jury panels were nonwhite; that the "chance" probability of such a racially-suggestive selection practice without race having entered into the selection was exceedingly remote; and that the procedure pursuant to which the foreman was

designated was wholly personal and subjective. The defendant urged that this evidence would at a minimum shift to the government the burden of producing evidence providing plausible explanation for the results other than substantial involvement of race. In response, the government offered no evidence (cf. the government's case in Rose v. Mitchell, 443 U.S. 549 (1979); compare it also with the government's case in United States v. Perez-Hernandez, 672 F. 2d 1380 (11th Cir. 1982); see also United States v. Daly, 573 F. Supp. 788, 795 (N.D. Texas 1983) ("Clearly, Judge Mahon's testimony, which the parties stipulated to be representative of the District practices ... rebutted any inference of purposeful discrimination."))

In denying Mr. Hobby's motion, the federal district judge held as a matter of law that "the addition of this element (App. Rec. at 214) makes [no] difference in the plan

that has been entered into by this district," i.e., that a federal grand jury otherwise satisfying the Fifth Amendment and pertinent Acts of Congress necessarily satisfies the Fifth Amendment even if the position of foreman is reserved in fact for white males only. On appeal, a three-judge panel for the Fourth Circuit agreed. The treatment of the issue is not left in doubt, as the following excerpt makes quite clear:

[T]he rights of defendants are adequately protected by assurance that the composition of the grand jury as a whole cannot be the product of discriminatory selection. (emphasis added)

Thus, that there may indeed have been purposive and systematic reservation for the position of foreman for white males only is to be treated as no abridgment of the following express, opening clause of the Fifth Amendment:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury.

Noting that this position is squarely opposed to the contrary conclusion of the Eleventh Circuit (United States v. Perez-Hernandez, 672 F. 2d 1380 (11th Cir. 1982))¹, this Court granted certiorari limited to the question thus presented.

QUESTION PRESENTED

The question presented has not previously been decided by this Court, although one might have thought it was because the answer was obvious rather than because it could be regarded as difficult or doubtful. The question is this:

Is a twenty-three member committee convoked to determine who shall be tried for a federal crime a "Grand Jury" within the

¹ See also United States v. Cross, 708 F. 2d 631 (11th Cir. 1983) (opinion by Judge Frank Johnson, categorically rejecting the government's argument that "the office of federal grand jury foreperson is constitutionally insignificant," in an opinion the Fourth Circuit did not have available at the time of its own decision in this case.) Portions of Judge Johnson's opinion in Cross are set forth in an appendix infra.

meaning of the Fifth Amendment when the position of foreman has been reserved for white males only?

To be sure, the question might be phrased in a slightly different way, but we think the starkness of the issue would remain utterly unaffected. To put the best face on the question (from ~~the~~ government's point of view), without obscuring the issue altogether, the question might be stated in the following alternative fashion:

Assuming no sufficient exclusion of non-white persons as might affect the constitutional composition of the Grand Jury as a whole, does the Fifth Amendment then permit a valid indictment by that jury when its foreman position has been reserved by the superintending Article III judge for white males only?

SUMMARY OF ARGUMENT

Respectfully, we believe the answer to the question is obvious and that, indeed, it will not divide this Court. Accordingly, we shall argue that when a federal criminal defendant makes a direct, timely, pretrial objection (cf. David v. United States, 411

U.S. 233 (1973)) accompanied by clearly sufficient evidence to require the government to put on at least some kind of evidence that might dissipate the inference of deliberate racial designation of the grand jury foreman and the government simply demurs, the presiding judge is obliged to dismiss the indictment and the government is obliged to begin again, i.e., to present its case to a "Grand Jury" consistent with the Fifth Amendment. We shall also argue that in no event could the error be extinguished by overruling the objection and then arguing subsequently that the outcome of the ensuing, improperly-held trial either moots or renders harmless the wrong thus done the accused. Unless, then, the accused neglects his own right of appeal or makes some other procedural default thought sufficient to cut him off (which no one claims to have occurred here), the duty of the Court of Appeals is perfectly plain. It

is to reverse the conviction with direction to dismiss the indictment, with or without prejudice to the right of the government to begin a new proceeding -- but in any event with due regard to the rights of the accused as guaranteed by the first clause of the Fifth Amendment. Correspondingly, the failure of the Court below to follow that course in this case was itself reversible error which petitioner has asked to be corrected, on direct review and in timely fashion, by the judgment of this Court. We see no reason for it to be denied.

ARGUMENT

I

We believe that no disagreement between the Eleventh and Fourth Circuit Courts of Appeals would have arisen, respecting the issue in this case, but for a misunderstanding of the pertinent case law. The divergence of views arises, we think, from an

understandable confusion resulting from dicta in a decision by this Court in a case not involving the Fifth Amendment Grand Jury clause at all. The case, Rose v. Mitchell, 443 U.S. 549 (1979), arose under the Fourteenth Amendment which contains no grand jury clause or guarantee.²

In Rose v. Mitchell, this Court noted the distinction between state and federal proceedings, but then went forward appropriately to observe that even in state criminal proceedings, purposive racial manipulation in the state's own selected mechanisms for bringing accused persons to trial might raise substantial questions under the due process

² Indeed, the Fourteenth Amendment provides no constitutional right that "No person shall be held" for felony trial for a state offense "unless on a presentment or indictment of a Grand Jury." Hurtado v. California, 110 U.S. 516 (1884). Rather, the states are constitutionally at liberty to proceed by a diversity of pretrial mechanisms, such as a preliminary hearing rather than an indictment, so long as the mechanism denies neither due process nor equal protection to the accused.

or equal protection clauses. Although Rose v. Mitchell held only that no sufficient prima facie case of purposive discrimination had been established, a majority of the Court suggested that in a future case racial discrimination in the selection of the foreman of the state Grand Jury might vitiate the subsequent conviction of the defendant.³

³ Specifically, the Court "assumed without deciding that discrimination with regard to the selection of only the foreman requires that a subsequent conviction be set aside, just as if the discrimination proved had tainted the selection of the entire Grand Jury venire." 443 U.S. at 55 n. 4. (emphasis added). Two Justices dissented from that suggestion (Justices Stewart and Rehnquist), reasoning from Mr. Justice Jackson's dissent in Cassell v. Texas, 339 U.S. 282, 298 (1950) that since states were not constrained by the Fifth Amendment's Grand Jury clause, "any possible prejudice" to the accused that might have resulted from the participation of the improperly selected Grand Jury foreman "disappears when a constitutionally valid trial jury later finds him guilty beyond a reasonable doubt." (443 U.S. at 575). A third Justice (Justice Powell) wrote separately to record his view that, in any event, the objection of the conviction could not be resurrected by way of collateral attack, in a federal habeas proceeding, after having lost on the merits following "a full and fair opportunity to litigate in the state courts the claim of discrimination." (443 U.S. at 579). Two Justices (White and Stevens) dissented from the outcome, on the other hand, believing that the prima [cont'd. on next pg]

This case is not a reprise on Rose v. Mitchell, as the Fourth Circuit (and even the Eleventh Circuit) assumed. It does not invite a gratuitous review of strong differences (e.g., differences of federalism, differences of incorporation, differences of equal protection, of due process or of harmless error) that trouble this Court in adapting the Fourteenth Amendment to the uses of state grand juries. Unfortunately, both the Fourth and Eleventh Circuits, while nominally understanding that Hobby and Perez were federal cases arising under the Fifth (rather than the Fourteenth) Amendment, nonetheless treated the issue substantially by borrowing "due process" and "equal protection" analyses. Each thus, in our view, mistakenly treated the issue in a manner that we think gratuitously invites confusion with state

facie case was in fact sufficient and unrebutted, and that the conviction should thus have been reversed.

proceedings which are not necessarily affected by a correct decision here. Correspondingly, each seriously understated the stricter requirements which this Court has always found in Fifth Amendment's explicit grand jury clause.

The necessity for isolating the more specific requirements of the Fifth Amendment grand jury clause was recognized by this Court most recently in Castaneda v. Partida, 430 U.S. 482 (1977), which voided a state criminal conviction on the basis of what this Court held to be an un rebutted prima facie showing of purposeful racial culling in the composition of a state grand jury as a whole. Castaneda was decided solely under the due process and equal protection clauses of the Fourteenth Amendment. No question was raised (nor could it have been raised) pursuant to the grand jury clause of the Fifth Amendment. That distinction, moreover, was

felt to be critical for the four members of this Court who dissented in Castaneda. Indeed, in explaining why they were unable to concur in the opinion for the Court, the dissent in Castaneda may very well imply that here, in this case, there is no reason at all to expect any division in this Court respecting the proper outcome. For in the course of his dissent for four members of this Court⁴, Justice Powell took care to note the differences, and not merely the similarities, between Fifth Amendment Grand Jury objections and the less demanding nature of the Fourteenth Amendment due process or equal protection clauses. (430 U.S. 509-510, 516). His observations are highly pertinent in this case. Indeed, we think they are

⁴ Justice Powell dissented on the ground that given the exceptional demographic and political circumstances of the Texas county in which the Grand Jury was selected, no sufficient prima facie case of purposive discrimination had been made.

controlling.

Specifically, Justice Powell provided an example according to which Fifth Amendment grand jury claims are separate from, independent of, and more precise than claims that state defendants may assert pursuant only to the more generalized "due process" or "equal protection" provisions of the Fourteenth Amendment or, for that matter, that federal criminal defendants might possess if protected only by the due process clause of the Fifth Amendment. Thus he noted:

The right to a "representative" grand jury is a federal right that derives not from the requirement of equal protection but from the Fifth Amendment's explicit requirement of a grand jury. The right is similar to the right -- applicable to state proceedings -- to a representative petit jury under the Sixth Amendment. See Taylor v. Louisiana, 419 U.S. 522 (1975).

The point was significant for the dissent in Castaneda because the separate affirmative requirement of a "representative" grand jury, as distinct from one merely not intentionally

culled of persons of the same race as the accused, afforded a federal criminal defendant a specific guarantee not captured in the less precise demands of the Fourteenth Amendment (or the less precise demands of the Fifth Amendment's own due process clause).

In a federal case, proof of insufficient demographic cross-sectional representativeness in the federal grand jury's composition would per se establish a prima facie case, sufficient to shift to the government the burden of justification; additional proof of probable purposiveness is not required (cf. Duran v. Missouri, 439 U.S. 357, 386 n. 26 (1979)). Additionally, given the unequivocal provision on the face of the Fifth Amendment's grand jury clause ("No person shall be held ... unless ..."), it is totally unnecessary in a Fifth Amendment case that the person who objects to an improperly constituted grand jury also be of the same race

or class unwarrantedly excluded from (or under-represented in) that jury. (See Duran v. Missouri, supra, and Taylor v. Louisiana, supra; cf. United States v. Cronn, 717 F. 2d 164 (5th Cir. 1983)).⁵

⁵ In principle, an accused should be able to insure that he not be wrongly "held to answer" when not indicted by a properly composed federal grand jury by immediate appeal from the erroneous denial of his timely, pretrial motion to dismiss. Since, however, overriding policies of judicial administration clearly discourage (and may forbid) such an interlocutory appeal (see, e.g., 28 U.S.C. § 1291, United States v. MacDonald, 435 U.S. 850 (1978)), necessarily the error must be corrected on subsequent direct review, without prejudice resulting from the fact of conviction at trial. Again, the situation is in contrast, rather than likeness, to state criminal proceedings insofar as there is no Fourteenth Amendment incorporation of the grand jury clause and the sole protections are of due process and equal protection alone.

Even if a majority of this Court had accepted Justice Jackson's position from Cassell v. Texas, (but see Rose v. Mitchell, 443 U.S. at 575), it could not apply Justice Jackson's argument to this case which involves not merely due process but also the specific command of the grand jury clause. The government may not first forbid an accused to seek timely correction of constitutional error by denying him an interlocutory appeal prior to trial (which trial by hypothesis the grand jury clause forbade to proceed on the basis of a constitutionally defective indictment), and then forbid him to have that error corrected even after trial (which, again, ought not have been held) on direct appeal. The Fourth Circuit itself suggested no such possibility. Either an immediate and
[cont'd. on next pg]

The implication is thus unmistakable that no member of this Court would disagree that a well-taken objection to an indictment returned by an improperly constituted federal grand jury would require the government to begin again, i.e., to turn the square corners of the grand jury clause by seeking reindictment by a grand jury within the compositional requirements of the clause. The question in this case, then, is solely whether the deliberate reservation of the foreman position for white males only is within the compositional requirements of the Fifth Amendment's explicit grand jury clause.

interlocutory appeal must be allowed in all cases in which a timely motion to dismiss the allegedly defective indictment is denied (and counsel correspondingly held to have "waived" the objection by failing at once to appeal) — a position this Court has not encouraged — or, as here, the original objection remains fully alive on direct review. Any other result would annihilate the grand jury clause by "Catch 22," i.e., that no one may appeal when it is timely, and no one subsequently convicted may appeal at all.

We submit that the answer to that question, although previously undecided for lack of occasion to state the obvious, is simple. The grand jury clause is one in which this Court has repeatedly emphasized that "the medium is the message." Strict compliance with its compositional integrity is extremely important, because its substantive integrity cannot ordinarily be subjected to extended discovery or review. As emphasized by this Court (see, e.g., Costello v. United States, 350 U.S. 359 (1956)),⁶ the internal confidentiality of federal grand jury proceedings ought generally to remain closed to discovery or to subsequent review. The principal protection of persons suspected of serious federal offenses under the grand jury clause is in the constitutional assurance of

⁶ And as emphasized also in the last third of Judge Johnson's recent opinion in United States v. Cross, 708 F. 2d 631, 633 (11th Cir. 1983), reproduced as Appendix A infra.

its fair composition without, however, throwing open its private deliberations to litigious discovery. An immense history, as well as strong considerations of public policy, counsel against the ahistorical extension of "due process" discovery into the sealed transcript or confidential proceedings of the federal grand jury. Precisely because that is so, however, it is correspondingly crucial that formal compositional standards of that jury be strictly adhered to. The fact and appearance of fairness in the composition of that jury thus checks, albeit imperfectly, what one might otherwise insist upon trying to determine by ad hoc foraging into its internal operations, e.g., how much evidence did it have, what kind of evidence did it receive, what degree of examination was made of its witnesses, what degree of influence did the United States Attorney appear to exert, what predispositions may have affected

its members, etc.

Adherence to formal integrity in the composition of a federal grand jury is the minimum to which an accused is entitled by the federal grand jury clause. The alternative, to be less concerned with invidious staffing practices in forming that jury, leaves no means available to secure the integrity of the grand jury clause other than by permitting a review of the jury's internal operation in each case: to determine the prejudice vel non of its actual conduct. But this latter approach is precisely, and wisely, what this Court has admonished is inappropriate. See United States v. Costello, supra. Accordingly, as the post of foreman necessarily designates the person so appointed as primus inter pares, the required standard is obvious: no invidious racial choice may affect that designation. The rule itself is simple and its application is straightfor-

ward. Any other rule would be puzzling to account for, ad hoc in its application, and indeed implausible even for the government to "explain." We can imagine no interest (indeed the government suggests none) in permitting the post to be reserved to white males only.

II

In this case, the Fourth Circuit concluded, without remanding for determination of what particular role the particular grand jury foreman actually played, that "the impact of the federal grand jury foreman ... is too vague and uncertain to warrant dismissal of indictment" even assuming the post was reserved for white males. (A-17, -18). We believe this constituted reversible error. We believe it was reversible error, however, not because the Fourth Circuit treated the issue as one of law rather than of "mixed" fact and law (i.e., what role this foreman

may or may not have had in this case), but because it erred although properly treating the question as one of law. Given United States v. Costello and similar cases, we agree that it is undesirable to have defense counsel forage within the transcript of federal grand jury proceedings in order to determine whether or to what extent a particular grand jury foreman was more--or--less influential than other jury members, or whether, if he were especially influential, how his race or racial perspective affected how he behaved or how he influenced others. No such inquiry or odious speculation is appropriate. Rather, the historic fact is that the foreman position is not just some supernumerary position honorifically invented in the twentieth century,⁷ and it retains its

⁷ Indeed, it is virtually as old as the grand jury itself and has frequently been critical to the protection of an accused. See Schwartz, Demythologizing the Historic Role of the Grand Jury, 10 Amer. Crim. L. Rev. 701 (1972).
[cont'd. on next pg]

identity as primus inter pares today. Thus, as a matter of law, in no case may it be reserved for white males only.

Appended to this brief is a lengthy excerpt from Judge Frank Johnson's particularized review in United States v. Cross, 708 F. 2d 631 (11th Cir. 1983), which is far more detailed than either the Fourth Circuit's abbreviated "review" in this case or, for that matter, the Eleventh Circuit's equally brief (although contrary) review in Perez-Hernandez. We believe that Judge Johnson's review is quite sufficient. Additionally, however the Handbook for Federal Grand Jurors, provided for the instruction for our federal grand juries, itself identifies the special character of the federal grand jury foreman. In less than fourteen pages of printed material (exclusive of glossary), "the foreman" is referred to -- and his or

her primus inter pares roles described -- at least ten times over:

1. The foreman is identified as "presiding officer," and as "officer" of the grand jury. (p. 7)
2. It is the foreman whom another grand juror "must promptly advise" should some emergency prevent the other's attendance. (p. 8)
3. It is by the foreman that "each witness" shall "be sworn" when the witness first appear. (p. 9)
4. It is "the court" itself that does "appoint" him or her. (p. 7)
5. It is the foreman who first puts questions to each witness following at once after the United States Attorney. (p. 9) The foreman's priority in this regard is twice noted. (p. 13, as well as p. 9)
6. It is the foreman who determines whether the grand jury requires the assistance of an interpreter. (p. 10)
7. It is the foreman who orchestrates the grand jury when all others will have departed, i.e., it is "the foreman" who "will ask the grand jury to discuss and vote." (p. 11)
8. Quite naturally, it is the foreman, once again, who "must keep a record of the number of jurors concurring in the finding of every indict-

ment." (p. 11)

9. And thus it is the foreman, again, who will "file" that record "with the Clerk of the Court." (p. 11)
10. And, at the end, it is the foreman who "must immediately report in writing to the court" any decision not to indict the accused (p. 11), a responsibility which historically exposed the foreman to confrontation with an angry or indignant judge. (See Schwartz, supra)

Respectfully, the foreman position which historically was one of leadership remains so, by government description, today. It is rife with special connection with the presiding judge and with the United States Attorney. It is the natural center of grand jury gravity when the jury finally meets by itself. It is formalized and designated officially. It can scarcely be dismissed now, after eight centuries of primus inter pares acknowledgement, as though it were but "Queen of the May." And, respectfully, we cannot imagine that this Supreme Court would conceivably conclude that it should, a century

after the slave clauses of our Constitution were expunged, with interpretation of the Fifth Amendment already fully adjusted in keeping with that development, now condone the reservation of that position for white males only, against the objection of any accused.

CONCLUSION

In summary, we again note that this case does not provide any occasion for this Court to resolve the questions that divided this Court in Rose v. Mitchell, nor does it require this Court to determine whether the post of federal grand jury foreman is distinguishable from what was involved in that case. Rather, it requires only that the Court hold that when a federally indicted person establishes a prima facie case of effective racial designation of the post of foreman for the federal grand jury which indicted him, he may not then be "held to

answer" in the absence of evidence sufficient to dissipate the inference that the federal grand jury was indeed composed in a manner which the first clause of the Fifth Amendment does not permit. When the accused's objection is raised directly at the earliest opportunity, prior to trial itself, moreover, neither can its erroneous denial be merged in the outcome of the ensuing trial which itself ought not to have been held. Rather, insofar as an immediate, interlocutory appeal from the prejudicial denial of the motion to dismiss the indictment is clearly discouraged (and may even be wholly forbidden) by existing federal rules and policies, the objection remains unprejudiced when renewed on direct appeal following trial. When renewed on direct appeal, it must be respected with the consequence of reversing the conviction, subject only to the right of the government to retry the accused if again indicted by a

federal grand jury that does meet the compositional requirements of the Fifth Amendment grand jury clause. Because the decision by the Fourth Circuit panel did not follow this course in this case, it must be reversed and remanded for further proceedings consistent with these requirements.

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February 9, 1984

Appendix A
Excerpts from United States v. Cross,
708 F. 2d 631 (11th Cir. 1983)

Even if we were not bound by Eleventh Circuit precedent, we would not adopt the government's contention that the position of federal grand jury foreperson is too insignificant to form a basis for challenging an indictment. Three reasons support this conclusion.

First, the responsibilities and duties of the foreperson in the federal system cannot, in our view, be dismissed as merely ministerial.⁸ For example, the foreperson decides when to contact the district judge, and the foreperson consults with the judge outside the presence of the grand jury.⁹

⁸ The district court, in reaching a contrary conclusion on this issue, held no evidentiary hearings to determine the foreperson's responsibilities. In light of prior precedent and the analysis infra, we decide this issue as a matter of law.

⁹ The record in this appeal includes correspondence between a grand jury foreperson and District Judge Ows which reflects a substantial role on the part of the foreperson in the selection of a deputy foreperson and in determining the grand jury's schedule.

Communications between the United States Attorney's office and the grand jury are through the foreperson. The foreperson decides when to convene and recess the grand jury. The foreperson, acting alone, may excuse grand jurors on a temporary basis. The foreperson may decide the order in which witnesses are called. The foreperson maintains order in the grand jury. The foreperson helps the United States Attorney decide whether to initiate contempt proceedings against recalcitrant witnesses. And according to an offer of proof made by Cross in the trial court, Assistant United States Attorneys were even prepared to testify that on occasion they had sought grand jury subpoena approval from the foreperson acting alone without the consent of the entire grand jury. These duties and responsibilities, and numerous others, considered in isolation, may

under certain circumstances seem "ministerial." However, the overall extent and nature of the foreperson's responsibility for the very functioning of the grand jury should not permit the conclusion that the position is constitutionally insignificant.

This reasoning is reinforced by testimony of federal district judges in cases in the Northern District of Florida and the Southern District of Florida as to their selection procedures for grand jury forepersons. See United States v. Holman, 510 F. Supp. at 665-66. Almost uniformly, the district judges selected as forepersons those who had good management skills, strong occupational experience, the ability to preside, good educational background, and personal leadership qualities. One judge even testified that the foreperson should be someone who could not "be easily led by the United States Attorney." United States v. Holman,

510 F. Supp. at 1180.¹⁰ If the duties of the foreperson were purely ministerial, a person with clerical experience would suffice. The fact that district judges look for far more than that suggests that the position is not insignificant.

¹⁰ For example, Appellant Cross made an offer of proof to the trial court of testimony of United States Attorneys that would show that "[o]n several occasions, the grand jury foreman was critical of the manner in which the United States Attorney's office conducted investigations before the grand jury, and thhe United States Attorney's office was responsive to those criticisms."

The nature of the relationship between the grand jury foreperson and the United States Attorney could have a significant effect on the deliberations of the grand jury. For example, in the recent case of Bryant v. Wainwright, 686 F. 2d 1373 (11th Cir. 1982) cert. denied, ___ U.S. ___, 103 S. Ct. 2096, 75 L. Ed. 2d ___ (1983), Mattie Lee Bryant was indicted by a Florida state grand jury for first degree murder of her husband. The grand jury foreperson was a white male, and one of the issues presented to this court was discrimination in the selection of forepersons. According to the state trial court, the shooting of her husband, allegedly in self-defense against his beatings, was "probably second degree [murder] or manslaughter at most." See Appellant's Brief at 31, Bryant v. Wainwright, No. 81-5483. In cases such as Mattie Lee Bryant's, which present sensitive sexual or racial issues, the composition of the grand jury and the sex and race of its foreperson conceivably could be of critical importance.

Second, even if leadership qualities and administrative ability were not considered in the selection process, the fact of a person's selection as grand jury foreperson may render the position significant. A foreperson has only one vote on the grand jury, but the selection by the district judge might appear to other grand jurors as a sign of judicial favor which could endow the foreperson with enhanced persuasive influence over his or her peers.¹¹

¹¹ This analysis is limited to Fifth Amendment claims. As several courts have noted, claims of underrepresentation in grand jury foreperson selections presented under the Sixth Amendment raise entirely different considerations. See, e.g., United States v. Musto, 540 F. Supp. 346, 361-62 (D.N.J. 1982) (federal grand jury foreperson's powers insufficient for purposes of Sixth Amendment claims; merits of Fifth Amendment claim not addressed); United States v. Breland, 522 F. Supp. 468, 474-77 (N.D.Ga. 1981) (federal grand jury foreperson does not possess sufficient influence over grand jury to permit Sixth Amendment challenge to foreperson selections; Fifth Amendment claim, however, may be presented). In part because of the analytical differences between Sixth Amendment claims and Fifth Amendment claims, we held in United States v. Perez-Hernandez, 672 F. 2d at 1384-85, that federal grand jury foreperson selections may not be challenged under the Sixth Amendment.

Third, regardless of the importance of the office of grand jury foreperson, we would not be inclined to refuse to inquire into a federal judge's selection process. To do so would leave us in the indefensible position of scrutinizing pursuant to Rose v. Mitchell, state grand jury foreperson selections for discrimination, while we would look the other way when similar challenges are raised against federal selections. We do not presume to guess at this point whether the federal judges of the Middle District of Georgia have in fact discriminated; we cannot, however, refuse to even permit an inquiry into their selection process. As the Court in Rose indicated, discrimination in the selection process "is especially pernicious in the administration of justice," 443 U.S. at 555, 99 S. Ct. at 2999, and "strikes at the funda-

mental values of our judicial sysem," id at 556, 99 S. Ct. at 3000. For this reason, the Court concluded that, regardless of whether a defendant could prove actual prejudice from such discrimination, "permitting challenges to unconstitutional ... action by [those who make grand jury selections] has been, and is, the main avenue by which [constitutional] rights are vindicated in this context." Id. at 558, 99 S. Ct. at 3001.¹² The same should be true in the federal system. See United States v. Cabrera-Sarmiento, 533 F. Supp. 799, 802 (S.D. Fla. 1982).

The government seeks to distinguish Rose from the instant case on the ground that the Tennessee grand jury foreperson performs significant functions which the federal fore-

¹² In approving the remedy of motions to dismiss indictments, the Court rejected alternative remedies, such as injunctions and other civil actions, as impractical and "expensive to maintain and lengthy." 443 U.S. at 558, 99 S. Ct. 3001.

person does not. In light of our earlier discussion of the federal position, we find few significant differences, and these differences are insufficient for a conclusion that the federal position is constitutionally insignificant. One difference is that the responsibilities of the federal foreperson have been developed by custom, practice, and necessity. Unlike the situation in Tennessee, no federal statute describes the role in detail. In terms of practical effect, however, we fail to see any difference as to whether the position is described by statute or by less formal means. And we do not understand the government to be arguing that, if the foreperson undertakes the duties we described above, he or she is acting ultra vires. The Tennessee foreperson also apparently serves more than one grand jury and assists the district attorney in investigating crime. See Mitchell v. Rose, 570 F. 2d

129, 136 (6th Cir. 1978). But for constitutional purposes, the foreperson's role as leader of any given grand jury should far outweigh his role outside the grand jury. Another possible difference, noted above, is that, unlike the situation in Tennessee, the signature of the federal grand jury foreperson is not a prerequisite to a valid indictment. Nevertheless, Federal Rule 6(c) states that the foreperson's signature "shall" be on the indictment; thus, the act of signing is one function that may be only ministerial.¹³

The district court and the government also point out that in Tennessee the foreperson does not actually serve as a member of any grand jury, but instead is selected from the public at large and serves several grand juries. In the federal system, on the other

¹³ Moreover, the federal grand jury foreperson's signature on an indictment gives the indictment a presumption of validity.

hand, the district judge selects a foreperson from the grand jury after it has been empanelled. But this difference is irrelevant insofar as it pertains to the significance of the foreperson's responsibilities in presiding over any given grand jury. Moreover, as long as the pool of potential forepersons contains qualified blacks and women, there should be no difference over the long run in the racial and sexual identity of those selected. In fact, if anything, the office of Tennessee foreperson arguably is less important than that of federal foreperson because the Tennessee foreperson, unlike the federal foreperson, is restricted to performing administrative functions. He does not participate in the grand jury voting process, see Rose v. Mitchell, 443 U.S. at 560, 989 S. Ct. at 3002, and thus probably does not have the potential for influence on the grand jury's deliberations that the federal foreperson

does.

To decide this appeal we need not speculate as to the possible effect of the alleged discrimination on Cross and other defendants in the Middle District of Georgia. It is enough for us that appellant has alleged discrimination in the selection process for a position on the grand jury which has significant responsibilities. Otherwise, if we were to decide that the foreperson position is insignificant, it would in our view be but a small step toward deciding in the next case that other compositional defects in the grand jury also are irrelevant. If the grand jury is to effectively fulfill its role as a check on prosecutorial abuse, the judicial system must jealously guard against attempts at undermining the grand jury's constitutional significance. For this reason, we disagree with the conclusion of the district court.

No. 82-2140

FEB 15 1984

ALEXANDER L. STEVENS
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

WILBUR HOBBY,

Petitioner,

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

**BRIEF FOR THE NAACP LEGAL DEFENSE AND
EDUCATIONAL FUND, INC., AS *AMICUS CURIAE***

IN SUPPORT OF REVERSAL

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INTEREST OF AMICUS^{*/}

The NAACP Legal Defense and Educational Fund, Inc., has a deep and abiding interest in the standards governing jury

*/ The parties have consented to the filing of this Brief, and their letters of consent are on file with the Clerk of Court.

discrimination challenges. Thus, amicus has appeared before this Court in many of the leading cases involving jury issues, both as counsel^{1/} and as amicus curiae.^{2/} This brief is filed in support of the petitioner.

We urge that the decision of the court below is inconsistent with well-established principles and, if allowed to stand, could lead to serious erosion of the right to have all aspects of jury selection be free of discrimination based on race and sex. The decision of the court below, in holding that the office of grand jury foreperson is too constitutionally insignificant to re-

1/ E.g., Patton v. Mississippi, 332 U.S. 463 (1947); Sims v. Georgia, 389 U.S. 404 (1967); Carter v. Jury Commission of Greene County, 396 U.S. 320 (1970); Turner v. Fouché, 396 U.S. 346 (1970); Alexander v. Louisiana, 405 U.S. 625 (1972).

2/ E.g., Peters v. Kiff, 407 U.S. 493 (1972); Davis v. United States, 411 U.S. 233 (1973).

quire reversal of a conviction upon a showing of systematic exclusion of Blacks and women from that office has, in effect, removed all constitutional restrictions on the selection of persons for that position. Such a result finds no support in the case law. Furthermore, the decision below fails to accord proper weight to Congress' intent when it passed the Jury Selection and Service Act of 1968 (28 U.S.C. 1861, et seq.).

SUMMARY OF ARGUMENT

I

This Court, in the exercise of its supervisory power over the administration of justice in the federal courts, should reaffirm the principle that discrimination on the basis of race or sex has no place in the selection of jurors. The decision of the Fourth Circuit would result on there

being no controls on the selection of grand jury forepersons even in those instances where there has been deliberate discrimination in the process.

II.

The Jury Selection and Service Act guarantees that service on grand juries in the federal system will be free of any type of discrimination. To permit such discrimination in the selection of those who serve as forepersons conflicts with the statute and the intent of Congress.

ARGUMENT

I.

THE COURT SHOULD EXERCISE ITS
SUPERVISORY POWER OVER THE
ADMINISTRATION OF JUSTICE IN
THE FEDERAL COURTS TO REVERSE
THE CONVICTION OF PETITIONER

The issue of systematic exclusion of Blacks from appointment as foreperson of

federal grand juries has been the recent subject of litigation and conflict among the federal circuit courts. The Fourth Circuit, from which this appeal is taken, declined to dismiss the indictment or reverse the conviction of of petitioner on the grounds that there was no deprivation of due process rights by the exclusion of Blacks from the ministerial position of federal jury foreperson. U.S. v. Hobby, 702 F.2d 466, 470 (4th Cir. 1983). Accord, U.S. v. Coletta, 682 F.2d 820, 824 (9th Cir. 1982). (Defendant failed to show that discrimination in appointment of federal grand jury forepersons results in "significant impact on the basic fairness of the process."); U.S. v. Aimone, 715 F.2d 822 (3rd Cir. 1983). These decisions are in direct conflict with two cases in which the Eleventh Circuit found constitutional significance in the office on the ground

the foreperson is endowed "with enhanced persuasive influence" over the other grand jurors. U.S. v. Cross, 708 F.2d 631, 637 (11th Cir. 1983); U.S. v. Perez-Hernandez, 672 F.2d 1380 (11th Cir. 1982).^{3/}

3/ Those circuits declining to attach constitutional significance to the office have done so based on a comparison of the duties of a federal grand jury foreperson outlined in the Fed. R. Crim. P. 6(c) with the duties of a Tennessee grand jury foreperson assumed to be constitutionally significant by the Court in Rose v. Mitchell, 443 U.S. 545 (1979). Fed. R. Crim. P. 6(c) provides that the court shall appoint one juror to be foreman who shall administer oaths, sign indictments, keep a record of the number of jurors concurring, and file the record with the clerk of court.

The Eleventh Circuit has rejected the claim that a federal grand jury is purely ministerial by acknowledging that the foreperson performs other functions than those recited in Fed. R. Crim. P. 6(c). The court took judicial notice of the facts that the federal foreperson decides when to contact the district judge; receives communications from the U.S. Attorney General's Office; decides when to convene and recess the grand jury; excuses grand jurors on a temporary basis; decides the order in which the witnesses are called; maintains order in the grand jury; helps

Amicus urges that to focus solely on the question of the significance of the office of foreperson,^{4/} an issue that should be resolved on the merits in favor

3/ continued

U.S. Attorneys decide whether to initiate contempt proceedings against recalcitrant witnesses; and approves grand jury subpoenas often without the consent of the grand jury. The Eleventh Circuit further relied on testimony of federal judges in two Fifth Circuit cases that they chose forepersons based on such criteria as good management skills, strong occupational experience, ability to preside, good educational background, and personal leadership qualities. The Court reasoned that clerical skills would be sufficient qualification for a purely ministerial job. Finally, the Eleventh Circuit recognized that the mere act of appointment by the district judge would render the office significant to the other grand jurors and thus "endow the foreperson with enhanced persuasive influence over his or her peers." Cross, 708 U.S. at 637.

4/ In addition to raising the constitutional significance issue, the Government has raised the possibility of a standing problem for petitioner to assert an equal protection claim. Brief for the United States, pp. 1 at n.4, 17 at n.10. Again,

of petitioner, is to overlook the function of the Court as guardian of the federal court system. Utilizing its "power of supervision over the administration of justice in the federal courts," the Court

4/ continued

the circuits are at odds with one another on whether a white defendant has standing to complain of the exclusion of Blacks from appointment to federal grand jury foreperson. Compare, U.S. v. Perez-Hernandez, 672 F.2d 1380 (11th Cir. 1982) and U.S. v. Cross, 708 F.2d 631 (11th Cir. 1983), with, U.S. v. Cronn, 717 F.2d 164 (5th Cir. 1983) and U.S. v. Coletta, 682 F.2d 820 (9th Cir. 1982).

In raising its standing objection, the Government relies on Alexander v. Louisiana, 405 U.S. 625 (1972) as well as on the Fifth and Ninth Circuit decisions. Alexander is inapposite to the case at bar because the court in that case denied standing of a male defendant to assert the underrepresentation of women as state grand jurors on the ground that there is no constitutional right to indictment by a grand jury in the state courts. The Fifth Amendment, on the other hand, does guarantee this right to all defendants in the federal courts. In any event, the government concedes that petitioner does have standing to raise a due process claim.

should ensure the eradication of all vestiges of discrimination in the federal judiciary. Ballard v. U.S., 329 U.S. 187, 193 (1946). Discrimination by district court judges in the selection of grand jury forepersons, no less than in the selection of grand jurors, "strikes at the fundamental values of our judicial system and our society as a whole...." Rose v. Mitchell, 443 U.S. 545, 556 (1978).

This Court has consistently recognized that "the scope of [its] reviewing power over convictions brought here from the federal courts is not confined to ascertainment of Constitutional validity." McNabb v. U.S., 318 U.S. 332 (1943).^{5/} This reviewing power has been extended repeatedly to check all forms of discrimination

^{5/} See also Glasser v. U.S., 315 U.S. 60 (1942).

that creep into the federal judiciary. Arbitrary exclusion of classes from juries "must be counted among those tendencies which undermine and weaken the institution of jury trial." Thiel v. Southern Pacific Co., 328 U.S. 217, 224 (1946).

There is a "strong policy the Court consistently has recognized of combating racial discrimination in the administration of justice." Rose v. Mitchell, supra at 558. This policy has been invoked and expanded under the supervisory power even in the absence of specific Congressional mandates. In Ballard v. U.S., 329 U.S. 187 (1946), the Court reversed the mail fraud conviction of a male defendant on the ground that women had been systematically excluded from grand and petit juries. Although Congress had not at that time prohibited disqualification of federal jurors on account of sex (as it had

for race and party affiliation) the Court concluded that

the purposeful and systematic exclusion of women from the panel in this case was a departure from the scheme of jury selection which Congress adopted and ... we should exercise our power of supervision over the administration of justice in the federal courts ... to correct an error which permeated this proceeding.

Ballard, 329 U.S. at 193.

The above cases stand for the clear proposition that race and sex discrimination may not be allowed to infect the selection of federal jurors in any respect or at any stage in the process. To condone such discrimination, even if it could be said to relate to a position that was merely symbolic or ministerial,^{6/} would be to allow the system of justice to be

^{6/} Amicus agrees with petitioner and the Eleventh Circuit that the functions of the foreperson bring the office within the scope of the rule of Rose v. Mitchell.

indelibly stained. The decision of the court below in effect holds that no matter how egregious, direct, and intentional the discrimination might be, it is irrelevant. Such a result, with its injury to the institution of justice in the federal courts, cannot be tolerated.

When the issue presented in this case is thus viewed as an institutional problem, the inquiry as to constitutionally significant injury to petitioner as a result of discriminatory selection of grand jury forepersons in the Eastern District of North Carolina commands less consideration.^{7/} The Court has long recognized

^{7/} The source of the systemic problem is denial of equal protection for black and female federal grand jurors by the district courts. Although the Court decided Peters v. Kiff, 407 U.S. 493 (1972) on due process grounds, the opinion in that case suggests that additional equal protection grounds are open for white defendants to challenge discrimination in jury selection. In

the danger of allowing discrimination within the judiciary; it "destroys the appearance of justice and thereby casts doubt on the integrity of the judicial process." Rose v. Mitchell, 443 U.S. at 555.

The injury is not limited to the defendant - there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the process of our courts ... [Thus,] reversible error does not depend on a showing of prejudice in an individual case.

Ballard, 329 U.S. at 195.

7/ continued

response to respondent's claim that a white defendant must show actual injury to himself as a result of improper jury selection to have standing the Court replied, "that argument takes too narrow a view of the kinds of harm that flow from discrimination in jury selection." Peters, 407 U.S. at 498. In cataloguing the "related constitutional values" offended by exclusion of blacks from jury service, the court included not only the black defendant's right to equal protection, but also "other constitutional values," based on the belief that "the exclusion of Negroes from

II.

THE EFFECT OF THE JURY SERVICE AND
SELECTION ACT OF 1968

In 1968 Congress amended Title 28 to strengthen its prohibition of discrimination in the district courts. In passing the Jury Service and Selection Act of 1968 (28 U.S.C. 1861 et seq.) Congress declared that it is the policy of the United States:

...that all citizens shall have the opportunity to be considered for service on grand and petit juries in the district courts of the United States

7/ continued

jury service injures not only defendants, but also other members of the excluded class." Peters, 407 U.S. at 499. Thus the case at bar is analogous to Barrows v. Jackson, 346 U.S. 249 (1953), where the Court allowed a white vendor to raise an equal protection defense to a restrictive covenant. "We are faced with a unique situation in which it is the action of the state court which might result in the denial of constitutional rights and in which it would be difficult if not impossible for the persons whose rights are

28 U.S.C. § 1861. Therefore, no one is to be "excluded from service" on account of race or sex. 28 U.S.C. § 1862.

These statutes are strong evidence of congressional intent to prohibit all forms of discrimination in the federal district courts. On their face these statutes do not specifically outlaw discrimination in appointment of grand jury forepersons, but the language, which is directed to "service on grand and petit

7/ continued

asserted to present their grievance before any court." Barrows, 346 U.S. at 257.

The practice of the district courts put in issue in this case violates the equal protection rights of black and female grand jurors to participate equally in the administration of justice and thus places an unlawful stigma upon these groups, See Strauder v. West Virginia, 100 U.S. 303 (1880). Unless defendants are allowed to raise these constitutional violations which deny rights to grand jurors and potential forepersons, these rights are likely never to be vindicated.

juries," fairly supports inclusion of service as foreperson within the statutory scheme.^{8/}

The legislative history of the Act likewise supports application of the statutory bar on discrimination to all aspects of discrimination within the grand and petit jury systems. Passage of the Act was the direct result of the Fifth Circuit decision in Rabinowitz v. U.S., 366 F.2d 34 (5th Cir. 1966), which focused attention on jury selection methods used by federal courts. The new system invoked by Congress in 1968 was intended to replace entirely the "key man" system long used in federal courts and broadly criticized in Rabinowitz. One of the central flaws in the key man method of jury selection cited by

^{8/} The title of the Act, the "Jury Service and Selection Act" further supports the reading of "service" to encompass more than mere selection to a jury.

the Court was the use of "broad and vague subjective tests" which resulted in disproportionate disqualification of Blacks from jury service. 366 F.2d at 51. The House Report likewise condemned the key man system as susceptible to unconscious discrimination.^{9/} Elimination of unconscious as well as intentional discrimination was to be accomplished under the Jury Service and Selection Act by enacting objective and uniform criteria for the selection of juries from sources broadly representative of the community.

The method of selecting grand jury forepersons used in the district courts is disquietingly like the key man system condemned in Rabinowitz. The only difference is that the selecting officials (the "key men") are judges, not jury com-

^{9/} H. Rep. 1076. (90th Cong., 2nd Sess., 1968).

missioners. They still use nebulous and non-uniform criteria for selecting forepersons, with the same result of large and statistically significant underrepresentations of both Blacks and women.

In summary, amicus urges the court to recognize the systemic nature of the problem complained of by this Petitioner. Affirming the decision below would put the Court in the unacceptable position of condoning discrimination on account of race and sex by federal judges while prohibiting court clerks, jury commissioners, and state court judges from acting in a similar fashion. The right of all citizens to enjoy equal participation in the administration of justice is a policy deserving of compliance by the federal judiciary.

CONCLUSION

For the foregoing reasons, the decision below should be reversed.

Respectfully submitted,

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No. 82-2140-CFY
Status: GRANTED

Title: Wilbur Hobby, Petitioner
v.
United States

Docketed:
June 29, 1983

Court: United States Court of Appeals
for the Fourth Circuit

Counsel for petitioner: Pollitt, Daniel H.

Counsel for respondent: Solicitor General

Entry	Date	Note	Proceedings and Orders
1	Jun 29 1983	G	Petition for writ of certiorari filed.
3	Aug 1 1983		Order extending time to file response to petition until August 31, 1983.
4	Aug 31 1983		Order further extending time to file response to petition until September 28, 1983.
5	Sep 28 1983		Order further extending time to file response to petition until October 7, 1983.
6	Oct 6 1983		Order further extending time to file response to petition until November 7, 1983.
7	Nov 9 1983		Brief of respondent United States in opposition filed.
8	Nov 16 1983		DISTRIBUTED. December 2, 1983
9	Nov 23 1983	X	Reply brief of petitioner Wilbur Hobby filed.
11	Dec 5 1983		REDISTRIBUTED. December 9, 1983
12	Dec 12 1983		Petition GRANTED. limited to Question 3 presented by the petition. *****
13	Jan 6 1984		Record filed.
14	Jan 6 1984		Certified original record & C.A. proceedings, 24 volumes (2 boxes) received.
16	Jan 18 1984		Order extending time to file brief of petitioner on the merits until February 15, 1984.
17	Feb 17 1984		Brief amicus curiae of ACLU, et al. filed.
18	Feb 21 1984		Joint appendix filed.
19	Feb 15 1984		Brief amicus curiae of NAACP Legal Defense Fund filed.
20	Feb 21 1984		Brief of petitioner Wilbur Hobby filed.
21	Mar 20 1984		SET FOR ARGUMENT. Wednesday, April 25, 1984. (1st case)
22	Mar 30 1984		Brief of respondent United States filed.
23	Apr 2 1984		CIRCULATED.
24	Apr 18 1984	X	Reply brief of petitioner Wilbur Hobby filed.